

Exhibit F

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SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY/CIVIL DIVISION
DOCKET NO. ATL-L-504-14

- - -
SHELLY RAHMAN and ABU RAHMAN, : STENOGRAPHIC
wife and husband, : TRANSCRIPT OF:
Plaintiffs, :
 :
v. : - CASE MANAGEMENT
 : CONFERENCE -
DAIICHI SANKYO, INC., ET AL., :
Defendants. :

- - -
PLACE: ATLANTIC COUNTY COURTHOUSE
1201 Bacharach Boulevard
Atlantic City, New Jersey
DATE: May 8, 2015 at 10:00 a.m.
- - -

B E F O R E:

THE HONORABLE NELSON C. JOHNSON, JSC

TRANSCRIPT ORDERED BY:
ADAM M. SLATER, ESQUIRE
Mazie Slater Katz & Freeman, LLC

SUSAN M. SHARKO, ESQUIRE
Drinker Biddle & Reath, LLP

- - -
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1 APPEARANCES FOR THE PLAINTIFFS:

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3 ADAM M. SLATER, ESQUIRE

Mazie Slater Katz & Freeman, LLC

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5

RAYNA E. KESSLER, ESQUIRE

6 MUNIR R. MEGHJEE, ESQUIRE

Robins Kaplan LLP

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9 APPEARANCES FOR THE DEFENDANTS:

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11 SUSAN M. SHARKO, ESQUIRE

DANIEL B. CARROLL, ESQUIRE

12 Drinker Biddle & Reath, LLP

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2 THE COURT: Good morning. Please be
3 seated. How is everybody doing?

4 This is Atwell and others versus Daiichi
5 Sankyo. And we'll just use one docket number,
6 ATL-3108-14.

7 Counsel, please enter your appearances.

8 MS. KESSLER: Good morning, Your Honor.
9 Rayna Kessler from Robins Kaplan.

10 THE COURT: Good morning.

11 MS. KESSLER: Good morning. Here for the
12 plaintiffs.

13 MR. MEGHJEE: Good morning, Your Honor.
14 Munir Meghjee from Robins Kaplan.

15 THE COURT: Good morning.

16 MR. SLATER: Good morning, Judge. Adam
17 Slater for plaintiffs.

18 THE COURT: Good morning.

19 MS. SHARKO: Susan Sharko from Drinker
20 Biddle for the defense.

21 THE COURT: Good morning.

22 MR. CARROLL: Good morning, Your Honor.
23 Daniel B. Carroll, Drinker Biddle & Reath, for the
24 defendants.

25 THE COURT: Good morning.

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1 Let's talk about Science Day briefly.

2 We agreed it's going to be an hour each.

3 Right?

4 MS. SHARKO: Yes, sir.

5 THE COURT: Okay, good. All right.

6 Because the last time I did something like this, I

7 thought we agreed an hour each and somebody else

8 decided it was going to be like an hour-and-a-half

9 each. It sort of messed up everybody's schedule.

10 Because Judge Kugler and I spoke a couple weeks ago,

11 and he was very enthusiastic about the idea of having a

12 Science Day and said he didn't see the point of having

13 a second Science Day. So he said if he wasn't on the

14 bench today, he would come down. And as o, I think

15 yesterday, they're still on schedule to be here at

16 1:00. So we'll hopefully be done long before then. I

17 know he didn't want to do it before noon, so we'll take

18 a short lunch break or whatever.

19 But let me just clear the air a moment.

20 Am I -- before we get to the whole

21 discussion of the FOIA documents and whether or not

22 they're entitled to a protective order, in looking at

23 the pleadings, can I assume that each of you is

24 prepared to provide, looking at the defendants'

25 response to request for admissions, I think it's about

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1 150-plus, within the next 45 days. And the plaintiffs,
2 with regards to the specialized information as to the
3 case-specific info needed on the plaintiffs, you're
4 prepared to do likewise as to the plaintiffs. Am I
5 correct?

6 I mean, it seems to be what your pleadings
7 are saying. And on the only note I made in the margin
8 is, well, you know, why not do it now. But I
9 understand you need more time to get information from
10 clients. And probably the same thing on your end.

11 But generally it appears that you are
12 agreeable to furnishing the information that's in
13 dispute. Am I correct?

14 I always like starting with where we agree
15 and then go to what we disagree on.

16 MS. SHARKO: So if you're referring to the
17 two 45-page letters that Ms. Kessler sent us after we
18 filed our discovery motion, what we told her when we
19 got those was we would review them, figure out what we
20 could provide, what we didn't think we needed to
21 provide and get that to her by the end of the month,
22 and we would sit down and meet and confer with them
23 about all their requests in those two long letters.
24 And so we're prepared to do that.

25 MS. KESSLER: Your Honor, we can go into

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1 the specifics of that. These are document requests
2 that we served last June originally, but --

3 THE COURT: See, there are times when I go
4 into the specifics --

5 MS. KESSLER: I understand.

6 THE COURT: -- of interrogatories and
7 requests for production, but, hopefully, I don't have
8 to do that with you. I mean, what I'd like to do -- I
9 mean, and there are occasions when you have to do it
10 one by one by one by one, but I got the impression from
11 your responsive pleadings, each of you, that we're
12 going to gather this information and we're going to
13 give you everything we have and, you know, we're not
14 avoiding this or we're not ducking our responsibility.

15 So what I'm hopeful of, unless you can
16 point to things right now where you know I'm not giving
17 it to them. Because the only thing I see on the table
18 where they're saying I'm not giving it to them, you
19 know, without being compelled to is the FDA
20 information.

21 Is that assessment correct?

22 MS. SHARKO: Your Honor, while we're --

23 THE COURT: Let her reply to that first.
24 Go ahead.

25 MS. KESSLER: We actually submitted a

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1 consent order to the defense last week, and we did copy
2 the Court, to let you know that in the individual
3 case-specific deficiencies that they cite in their
4 two-page letter brief, we are providing all that within
5 45 days. And that is the wage loss information that we
6 have still been compiling.

7 THE COURT: Contact information for the
8 witnesses in Atwell and Braswell but not the experts.
9 Information regarding the medical and out-of-pocket
10 expenses of Douglass and Wallace. And information and
11 documents supporting lost wage claims for Knight,
12 Braswell and Wallace.

13 MS. KESSLER: Exactly, Your Honor.

14 THE COURT: You're going to provide those?

15 MS. KESSLER: Absolutely. And we provided
16 a consent order to address that.

17 What we have an issue with, of course, is
18 that there's a lot more discovery that they're asking
19 for in their proposed orders that wasn't explained in
20 their briefs that we're not even sure how we have not
21 complied when we have provided these responses.

22 But we can argue that.

23 THE COURT: Well, is there any reason for
24 optimism that you can meet and resolve those?

25 MS. KESSLER: Absolutely, Your Honor. And

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1 we've been talking with the defense this week. We
2 tried to reach out to them last week. We didn't have
3 any conversations about it.

4 But, Your Honor, another solution that we
5 have proposed to the plaintiffs, and what's happening
6 in the MDL, I know we'll be giving a status report to
7 you --

8 THE COURT: Proposed to the defendant or
9 are you talking about your clients?

10 MS. KESSLER: In the MDL that Judge Kugler
11 has --

12 THE COURT: Okay, go ahead.

13 MS. KESSLER: Judge Kugler is implementing
14 a plaintiff fact sheet, which I'm sure you're familiar
15 with from Accutane, as well as a defense fact sheet.
16 And we think that is an absolutely fair solution to
17 this, that it's the most efficient way to address which
18 questions are really relevant to this litigation.

19 We can work that out. We're willing to
20 adopt whatever is done in the MDL to apply to this
21 group of 60 cases as well. And that clears all of the
22 objections off the table and it clears the Court's time
23 to have to go through --

24 THE COURT: I think two weeks ago today I
25 spent about two hours reviewing individual questions of

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1 the fact sheet. We got it resolved. And that
2 really -- I mean, I'm not preaching to you, because I'm
3 sure you know this better than I do, but a lot of these
4 questions can be resolved by simply agreeing upon
5 what's the information that you need from everybody and
6 agree as to what it will be.

7 MS. SHARKO: So here's the problem, Judge.

8 THE COURT: Go ahead.

9 MS. SHARKO: The consent order that Ms.
10 Kessler sent to the Court, without first sending it to
11 us, addresses some of the interrogatories they haven't
12 answered. It doesn't address all of them. These
13 interrogatories have been outstanding in the first
14 group of cases since last spring. Almost a year we've
15 been chasing the plaintiffs for the answers. And we
16 really would like the answers. We don't want to have
17 to start over from the beginning on discovery.

18 The two questions that are not in the
19 consent order that have yet to be answered by Ms.
20 Kessler in the cases which are the subject of the
21 motion, and they've been answered by other plaintiffs
22 in other cases, are tell us your version of the events
23 and give a detailed description of the injuries you
24 claim. We want to know what the injuries they claim
25 are. That's a standard, basic question.

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1 THE COURT: I think we'll all concede that
2 the Form C Interrogatories for cases such as this are a
3 bit obtuse. But I also think what the Supreme Court
4 had in mind when they promulgated those, that everybody
5 be reasonable and everybody be cooperative and
6 everybody get as full an explanation as they can.

7 At some point -- and I agree with Ms.
8 Sharko on this, Ms. Kessler, at some point you're going
9 to have to be able to explain to us, you know, how the
10 ingestion of this pill -- and I'm not talking about the
11 scientific right now. At some point you're going to
12 have to explain time, circumstances, prescription, the
13 whole event surrounding this person's illness so it
14 makes sense to everybody. Right? I mean, if this case
15 is going to go to a jury, we have to understand, okay,
16 they were prescribed the pill on a certain date for a
17 certain condition by a certain physician, and within a
18 certain time frame, they develop certain symptoms.
19 Aren't we going to have to know that for everybody?

20 MS. KESSLER: Absolutely, Your Honor. And
21 part of this is that some of the discovery that they're
22 seeking is duplicative. Even though there's that Form
23 A response that they are moving to compel, there's also
24 a Question 7 in their supplemental rogs that is exactly
25 the same language that we fully answered that they're

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1 not moving to compel except in Braswell.

2 So we have provided more information in
3 these discovery responses. But in addition, we also
4 have provided thousands of pages of medical records
5 that support these claims. Our clients have signed
6 medical authorizations, employment authorizations --

7 THE COURT: And I see this a lot in lots of
8 different cases. I'm sure they can make the same
9 criticism of you, the plaintiffs sometimes make of
10 defendants, which is, you know, they dumped a whole
11 bunch of records on us and we're supposed to figure out
12 what the hell they mean. Okay?

13 And, you know, I think if the plaintiffs'
14 claim is focused a little bit, that not only helps the
15 plaintiff, but it helps the defendant have a better
16 understanding of what the claim is about. So I can
17 empathize with her saying, well, they dumped all these
18 records on us and they spanned so many years and they
19 spanned X number of doctors, but, you know, okay, show
20 me the smoking gun or show me the cause and effect or
21 show me the chain of events.

22 MS. KESSLER: And I completely understand.
23 And we have not withheld this information. We are
24 fully complying with the Question 7 in the supplemental
25 rogs that ask for the same information.

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1 But in addition, there's an example, it's
2 George Williams is a filed case where for a Form A rog,
3 we have provided a narrative form, it goes for two
4 pages. The plaintiff had 16 hospitalizations. There's
5 all listed --

6 MS. SHARKO: There's no motion on that
7 case.

8 MS. KESSLER: There's no motion, but the
9 discovery --

10 MS. SHARKO: There's no motion.

11 THE COURT: Let her finish and then I want
12 to hear what you have to say.

13 MS. SHARKO: Okay.

14 THE COURT: Go ahead.

15 MS. KESSLER: The same deficiency letters
16 that have been served on me have been served on all
17 counsel here and all counsel in all these cases. And
18 even though we provided that narrative, Ms. Sharko also
19 served a deficiency letter saying that that wasn't
20 specific enough.

21 Now, there isn't a motion pending in front
22 of you, but I think it's important to understand --

23 THE COURT: I'd rather discuss it now.

24 MS. KESSLER: And I have it with me, if
25 you'd like to see the full description, but, you know,

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1 this is where the dispute is.

2 And then there's also examples of
3 information that they're moving to compel in the
4 proposed orders that isn't in their briefs that we have
5 supplied.

6 One is -- Number 1, it's a question of
7 provide the name, address and -- name, address and date
8 of birth for the plaintiff. We've provided that. And
9 they're moving to compel that. It's clearly answered
10 if you look at the answer. We provided that.

11 And another example is in David Douglas,
12 they're moving to compel all wage loss information.
13 The plaintiff withdrew those claims. The wage loss
14 isn't even here -- it isn't even part of the case
15 anymore, but they're still moving to compel that
16 information.

17 There's also another question in Shelly
18 Rahman that they're moving to compel her information as
19 to a criminal history. She answered that. She has no
20 criminal history. We've answered no.

21 So there's a lot of information that
22 they're moving to compel that we have fully provided.

23 But then there is another set of questions
24 that are clearly inappropriate and, you know, we can
25 talk about that. It goes into the FOIA document

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1 argument as well.

2 THE COURT: We're going to -- I'm saving
3 that for last, because I assume that's going to consume
4 the most time.

5 Ms. Sharko?

6 MS. SHARKO: So Ms. Kessler has not
7 addressed the question. The question is, do they have
8 to answer the interrogatories. Specifically, we filed
9 targeted motions on the cases --

10 THE COURT: Well, here's my question: What
11 if she said, see answer to number something else
12 someplace elsewhere where there's a narrative?
13 Wouldn't that satisfy it?

14 MS. SHARKO: That would be fine, Judge, but
15 that's not what they did. In some cases, they provided
16 narratives and answers, like the Williams case, so
17 there's no motion in the Williams case.

18 In the cases where we made the motion, we
19 asked, tell us a detailed description of the nature,
20 extent and duration of any and all injuries. So, for
21 example, when Mr. Rheingold answered that question in
22 his cases, he laid out, she was in the hospital for
23 five days, she had this problem for two weeks
24 thereafter and now she has this problem. That's the
25 way plaintiffs' lawyers are supposed to answer those

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1 questions.

2 What Ms. Kessler did in the cases that are
3 the subject of the motion, not in all of her cases, but
4 in the cases that are the subject of the motion, is she
5 cut and pasted the same answer in all the cases from
6 her Complaint, "Severe and debilitating intestinal
7 and/or colonic disease, manifestations," and it goes on
8 from there.

9 What we're looking for, what we're entitled
10 to have, is what are the damages claimed, what happened
11 to the person and what are their residuals. And they
12 should have to answer that. That's what the motion on
13 Question Number 3 is.

14 And so I think we need to look at each of
15 the questions which are the subject of the motion and
16 we request that they answer them.

17 If there's no lost wage claim, then they
18 should say so and we don't -- we won't pursue that.
19 But we need to have answers to these basic things.

20 THE COURT: Well --

21 MS. KESSLER: Your Honor, if I could just
22 respond. I can read you our response in the motion --
23 or the question that they're moving to compel in
24 Braswell. For Number 7, the supplemental rogs, we
25 provided a much more detailed description of it.

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1 "Plaintiff identifies the following injuries, elements
2 or pains: Dizziness, nausea, belching, diarrhea,
3 vomiting, weakness and other stomach problems and other
4 residual problems for which treatment has been given by
5 those entities listed in plaintiff's answers to Form A
6 interrogatories."

7 Just as you said, Your Honor, we're
8 referring to other parts where we answered this
9 discovery. A lot of these questions are duplicative.
10 And then there's others that are just clearly
11 inappropriate. For example, they request all medical
12 information from date of birth. You know, I think we
13 can all agree that when the plaintiffs are suing on the
14 basis of ingesting a drug from a particular set of
15 time, which we have provided to the plaintiffs, that
16 their entire medical history from birth isn't relevant.

17 And then in addition --

18 THE COURT: Unless they're very young.

19 MS. KESSLER: Most of them are older.

20 But then again, they also ask for the
21 entire employment history, from age 18, of every single
22 one of our plaintiffs.

23 THE COURT: Again, unless they're very
24 young, you know, I do this with lawyers frequently. We
25 negotiate what's a reasonable time to look back and we

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1 agree upon a number. Or we don't agree upon a number
2 and I pick a number.

3 But, I mean, I would think, Ms. Sharko, in
4 terms of, you know, entire history from the day they
5 were born, that's pretty overbroad. And it could turn
6 out to be unreasonable, because there were a time when
7 people didn't keep good records. There were times when
8 a physician's office was closed and the records got
9 dumped. We live in a different world right now. But
10 in terms of trying to get the entire medical history of
11 people, it could be difficult.

12 So, I mean, what's a reasonable time frame?
13 X number of years prior to the -- prior to ever
14 ingesting this medication?

15 MS. SHARKO: And so I don't think that
16 counsel has correctly framed the issue, but to answer
17 Your Honor's question, we'd like 20 years of medical
18 history.

19 THE COURT: I think that's excessive.
20 Right now, I can tell you I think it's excessive. I
21 think half of that is getting to the outer limits. 20
22 years I think is excessive. I'm talking about the X
23 number of years, not prior to the filing of the
24 lawsuit, but X number of years prior to the ingestion
25 of this medication. 20 years? I think that's

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1 excessive.

2 MS. SHARKO: And the reason is, is these
3 people are taking the medication for hypertension.

4 THE COURT: Right.

5 MS. SHARKO: They have long years, many of
6 them, of a history of hypertension. And so we, I
7 believe, need to know what their medical history has
8 been --

9 THE COURT: Yeah, but it sounds like they
10 have only a short history of these symptoms. Right?

11 MS. SHARKO: Symptoms meaning hypertension?

12 THE COURT: No, no. I'm talking about the
13 symptoms of intestinal colonic disease and
14 manifestations known as sprue-like enteropathy. They
15 have a short history of that.

16 And so I'm saying, when did they take
17 Benicar, and then let's move back from that a
18 reasonable date and then look at all the medical
19 records you want.

20 MS. SHARKO: So 10 years back from their
21 first Benicar prescription?

22 THE COURT: I would say 10 years is the
23 outer limits, to be honest with you. 20 is excessive.
24 It really is. It creates an unnecessary burden on a
25 lot of people. And let's be candid about it. It's

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1 going to create -- judges don't like entering orders
2 that they think can't be complied with.

3 And so if I say 20 years to satisfy you, I
4 know we're going to come up with multiple situations
5 where I'm going to have to be reviewing explanations as
6 to why they couldn't get anything after year 15 or
7 after year 17 or after year 12, because Dr. So-and-so
8 died and the people who brought his practice weren't
9 interested in his records anymore.

10 MS. SHARKO: I would never bring an issue
11 like that to the Court when --

12 THE COURT: I don't know if you would or
13 you wouldn't. 20 years is excessive. It really is.
14 I'm talking from the time -- because I understand
15 hypertension can last a long time. I've had members of
16 my family that had hypertension for the last 50 years
17 of their life. Okay? But they didn't take a
18 particular medication for 50 years. And they didn't
19 have symptoms from that medication after a certain
20 point in time.

21 So I think the window, the window has got
22 to be a little bit narrower, a lot narrower than 20
23 years.

24 MS. SHARKO: I would ask for medical
25 records from the first diagnosis of hypertension. So

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1 in some people, that will be a short period of time,
2 and in others, that will be longer. But it's about --
3 this litigation is about a hypertension --

4 THE COURT: See, but the symptoms that
5 we're talking about here, in terms of, you know,
6 intestinal difficulties, they had a beginning point.

7 MS. SHARKO: Not necessarily, Judge. There
8 are plaintiffs who have had these symptoms on and off
9 for many years, because they have irritable bowel
10 disease, because they have celiac disease, because they
11 have colitis. These are not --

12 THE COURT: No, I hear you. I see
13 it in other cases. And, again, you see it anecdotally
14 in your own personal history. There are people who can
15 have, for lack of a better term, spastic colon when
16 they're a young person and then they have no other
17 manifestation until years later.

18 But what I'm trying to negotiate with you,
19 and if I can't do it, I'll arbitrarily set it. We'll
20 pick a date, which is the date that Benicar was first
21 prescribed, and then go back a certain number of years
22 and say, we want your complete medical history for that
23 window of time preceding the first prescription of
24 Benicar.

25 I think that's the way to approach it. 20

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1 years is not the number. I think a reasonable number
2 is seven years. And if within those seven year --
3 within that seven-year window you detect something that
4 says, you know, it looks like this condition was a
5 whole lot prior to that date in the seventh year that
6 we're looking at, and, Judge, we need more records, my
7 response will be yes.

8 MS. SHARKO: Okay. We would agree to ten
9 years before the first Benicar prescription.

10 THE COURT: Well, doesn't matter. I'm
11 ordering seven. I'm glad you agree, but I'm ordering
12 seven.

13 MS. SHARKO: Okay.

14 MS. KESSLER: Your Honor, may I just make a
15 suggestion as to --

16 THE COURT: Ms. Sharko, I don't mean to be
17 disrespectful to you, but I'm sitting here saying to
18 myself, what's reasonable? If you find something in
19 the seventh year that indicates to us, hmm, this thing
20 looks like it's been around for a while, then you're
21 certainly going to be entitled to the additional
22 medical history.

23 I don't know, but my prognostication is
24 that we're not going to have too many of those
25 situations. I think what we're going to have is the

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1 seven years is going to be plenty of information on
2 everybody. It's going to be seven years.

3 MS. KESSLER: And I think the same
4 limitations as far as employment history, all these
5 other questions of information that they're seeking --

6 THE COURT: Well, I look at employment
7 maybe a little bit differently. I think seven years is
8 reasonable for employment, too, unless they were with
9 one employer that entire seven years and then maybe
10 want to know who the employer was before that, because
11 maybe there was a reason for separation that might be
12 relevant to their credibility, might be relevant to the
13 injury, might be relevant to whatever. So, you know,
14 if they had one employer for seven years, then I would
15 say, okay, who were you employed with prior to that and
16 prior to that. The last three employers or seven
17 years.

18 MS. SHARKO: That's actually not an issue
19 before the Court, but we'll do that.

20 THE COURT: Hold on. What I'm trying to do
21 is see what we can agree upon to expedite things.
22 Because, I mean, until you have all the information you
23 need and until you have all the information you need,
24 you know, this case isn't going to be ready for
25 anything.

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1 What I'm trying to do is minimize -- I've
2 had enough telephone conferences with you to know that
3 you're not agreeing a whole lot with one another, so
4 what I'm trying to do is expedite things.

5 MS. KESSLER: Your Honor, I think the most
6 efficient way to do that is for us to meet and confer
7 to figure -- to implement this fact sheet.

8 THE COURT: Well, I'm giving you some
9 guidelines.

10 MS. KESSLER: Absolutely.

11 THE COURT: I think seven years. And, you
12 know, that's not an arbitrary number. I get to seven
13 years from -- in many situations, in terms of business
14 records, tax records, seven years is typically a cutoff
15 point.

16 But let's get back to the subject at hand.
17 When I look at answer -- and we'll be specific now.
18 When I look at Answer Number 3 to the interrogatory
19 propounded to Mr. Atwell, detailed description, nature,
20 extent and duration of any and all injuries, severe and
21 debilitating -- and we know what it says. All right.

22 Now, here's my question: Do you give
23 supplemental or additional narrative for Atwell
24 someplace else?

25 MS. KESSLER: Yes, Your Honor. In Question

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1 Number 7 in the supplemental interrogatories, which
2 they did not move to compel, the question says,
3 "Describe fully and" --

4 THE COURT: This is the hospitalizations
5 you're talking about?

6 MS. KESSLER: The question, it reads,
7 "Describe fully and with particularity how the incident
8 occurred, including all injuries, elements or pains
9 which you allege arose."

10 We provided a more full answer in that, and
11 they have not moved to compel in Atwell. They have
12 only moved to compel a more complete response in
13 Braswell, which we read before. So I think they're
14 entirely duplicative questions.

15 THE COURT: I'm looking at the answer to
16 Number 3. And we know you're going to have the medical
17 records before this person is deposed.

18 Aren't you going to learn a lot of things
19 you need to learn at the deposition?

20 MS. KESSLER: Your Honor --

21 MS. SHARKO: See, the problem is, Judge --

22 THE COURT: Ms. Sharko is going to reply.

23 MS. SHARKO: The problem is, Judge, with
24 the answer to 7, there's a long objection and then she
25 says she identifies the following injuries from April

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1 2013, "belching, diarrhea, vomiting, weight loss and
2 other stomach problems and other residual problems for
3 which treatment has been given at various times."

4 And the interrogatory asks specifically
5 describe what the injuries are, in what respect you're
6 still affected by them, state where, by whom and how
7 frequently you're still under treatment and when you
8 were last seen or given medical attention. And that's
9 what we want to know. How are these people doing
10 today? And that is particularly important, because as
11 you'll hear this afternoon, the science is overwhelming
12 that these people who have this alleged problem have no
13 residuals.

14 So if the New Jersey plaintiffs are
15 different and they claim residual injuries, they claim
16 that they're still under treatment, we want to know
17 what their residual injuries are, what treatment
18 they're receiving and by whom or whether they've
19 recovered. It's a basic litigation question.

20 And saying other stomach problems and other
21 residual problems for which treatment has been given at
22 various times by the healthcare providers listed in
23 this other answer isn't enough. We appreciate that
24 they're giving us a list of healthcare providers, but
25 we want to know what are the permanent injuries they

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1 claim, what is the treatment they're still receiving.

2 In these medical records, many of these
3 people have long, complicated medical histories. And
4 so I could read that and say, yeah, they can't be
5 complaining that their heart palpitations are related
6 because they had heart palpitations for years, but
7 that's me interpreting their answer. They need to
8 specify what is it that they're laying at our feet as a
9 permanent or continuing injury and what treatment are
10 they receiving for it. There's no other way to
11 evaluate the case.

12 MS. KESSLER: Your Honor --

13 THE COURT: Well, I respectfully disagree
14 with you.

15 Let's hear from Ms. Kessler.

16 MS. KESSLER: They haven't moved to compel
17 any responses to Question 7 except for Braswell. The
18 other ones they have deemed sufficient and that's not
19 before you. So to say that we're not fully complying
20 with providing a description, you know, it's belied by
21 the fact that they're not moving before you for that.

22 But I have George Williams here, where
23 there is a narrative account that's provided, along
24 with their deficiency letter that they're sending. And
25 it's another point to keep in mind, that Ms. Sharko, as

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1 pro forma, in every single one of these cases is
2 sending all plaintiffs' counsel these deficiency
3 letters where she sets out what she believes is
4 deficient.

5 I think I'm one of a few that is actually
6 responding to these letters and providing additional
7 information. So it's not, Your Honor, just what's in
8 these interrogatory responses, it's also our
9 correspondence, it's our letters afterwards, it's our
10 medical records. We have provided an enormous amount
11 of information to Ms. Sharko.

12 MS. SHARKO: There's no issue before the
13 court in the Williams case. The Williams case has
14 responsive answers.

15 MS. KESSLER: And yet a deficiency --

16 MS. SHARKO: The Levin Papantonio firm gave
17 responsive answers.

18 Where we think we need more information or
19 we want follow-up, we send a letter. That's how it
20 works. And there should be a meet and confer. The
21 Williams case is not the subject of any motion.

22 MS. KESSLER: It's not the subject of a
23 motion, but it's a subject of this litigation tactic.

24 THE COURT: And I prefer discussing it now
25 rather than seeing another motion later.

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1 When I look at the answer to Number 3 and I
2 look at the answer to Supplemental Number 7, and when I
3 consider the fact that you're going to have medical
4 records, I'm saying to myself -- I guess we all bring
5 our experiences and prejudice with us to the things
6 that we do. And I did mostly commercial litigation for
7 30 years. And, candidly, there were times when I
8 didn't propound interrogatories because I wanted that
9 person under oath so that their lawyer couldn't help
10 them with the answer and so that they couldn't squirm
11 out of the answer later on. And the more detailed
12 information you ask for in writing, the more assistance
13 they get from the lawyer in preparing the answer.

14 Now, I agree there's a certain amount of
15 limiting of the wiggle room that way too, but stuck in
16 the position I'm in now, in terms of having to decide
17 is this answer sufficient, seems to me it is. It seems
18 to me that the next thing you want to do is depose this
19 person. That's my perspective.

20 MS. SHARKO: Okay. Then we'll start the
21 depositions.

22 THE COURT: That's fine. Because I'm
23 looking at the answer to Number 3, the supplemental
24 answer to 7, and overlaying or, you know, injecting
25 into that, weaving into that, I'm thinking of the

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1 medical records. Fine. Next thing to do is depose
2 them.

3 MS. SHARKO: Okay. If that's --

4 THE COURT: All right. Yeah, it's
5 really -- I'm just looking at this one right now,
6 Atwell. Okay? Because we've got the answer to Number
7 7 in the first, which is all the hospitalizations and
8 doctors. And I'm assuming there's records to back
9 those up?

10 MS. KESSLER: Absolutely.

11 THE COURT: Okay. So we got the answer to
12 Number 3, we got the answer to Number 7, we've got the
13 answer to this Number 7. And I'm saying to myself, the
14 next thing you ought to be doing is taking depositions.

15 I'll concede to you, I may be injecting my
16 prejudices into it. But I think objectively, you've
17 got enough to get started to go from there in taking a
18 deposition. I genuinely believe that.

19 MS. KESSLER: And we had --

20 MS. SHARKO: And --

21 THE COURT: Let her finish, please.

22 MS. SHARKO: So we will do that. I was
23 hoping I could find out, short of a deposition, what
24 the residual injuries were in each case. I have
25 started to request depositions. The plaintiffs have

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1 taken a position that we can't go forward with them.

2 They gave us --

3 THE COURT: That was one of the things we
4 were -- one of the things we're going to talk about
5 today, when we get through the motions, is a schedule
6 to talk about fact witness depositions.

7 MS. SHARKO: Okay. They gave us dates for
8 depositions in two cases and not for any others. But
9 we'll proceed with deposing all of them. That's fine.

10 THE COURT: I think that's where we are.
11 If the answers to the others are comparable to what we
12 have in Atwell, then I'm saying, next thing to do is to
13 depose them. That's my perspective on this.

14 MS. SHARKO: We do need Answers to
15 Interrogatories and preliminary requests and document
16 requests in a lot of cases. There are a lot of them
17 that are overdue. We haven't filed any motions, but
18 that is an issue.

19 THE COURT: Well, I'm hearing from Ms.
20 Kessler that for those situations where there's
21 disagreement, they're going to meet and discuss it.
22 It's an amazing term, "meet and confer." I hear it all
23 the time. You're going to meet and discuss it. And
24 what you can't agree upon, somebody will make a motion.
25 But hopefully we won't be at that point.

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1 So all that said, where are we? Because I
2 know that plaintiff has agreed to give you the
3 case-specific information, the three categories that I
4 just a moment ago read into the record.

5 I know that the defendant is prepared to
6 provide their responses to the requests for
7 admission -- or excuse me, the request for production
8 within 45 days.

9 Anything else that's still in dispute on
10 the paper discovery that is the subject of this motion
11 today?

12 MS. SHARKO: On the paper discovery, we're
13 going to get back to the plaintiffs on the points
14 raised in their letter and meet and confer, supplement
15 where we can. And where we can't and we'll disagree,
16 then if we disagree, then we'll contact the Court.

17 THE COURT: Okay.

18 MS. SHARKO: You mentioned the request for
19 admissions. Mr. Slater and I have an agreement on
20 dates for serving requests for admissions. That's not
21 before the Court because Mr. Slater and I worked that
22 out. But you raised request for admissions, so I
23 thought I hadn't answered that question.

24 THE COURT: 45 days takes us to around June
25 12th, I think. Right?

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1 MS. KESSLER: Your Honor, I just need --

2 THE COURT: If you need a few more days
3 after that, that's fine too. We'll plug in a different
4 date. June 26th, two weeks after that, and then
5 everybody lives with that date. How does that work?

6 MS. SHARKO: And that's for the plaintiffs
7 to respond to our requests and for us to get back to
8 them on their letter and meet and confer?

9 THE COURT: Correct. That's for both of
10 you, whatever is outstanding, June 26th will be the
11 date by which you have to furnish it. I think that's
12 like seven weeks from today.

13 MS. SHARKO: I would -- just one issue
14 raised by Ms. Kessler's letter, and we have to work
15 that out, is documents. Obviously we won't have all
16 the documents in the entire litigation produced by June
17 26th. I don't think that's what Your Honor
18 contemplated -- is contemplating.

19 THE COURT: When you say documents, are you
20 now moving to the next issue, the FDA documents under
21 FOIA, or what are you referring to?

22 MS. SHARKO: No. Just her letter addresses
23 discovery requests, interrogatories and document
24 requests. And we're doing documents on a rolling
25 basis. We produced 3 million-plus pages, and we

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1 continue to do that every week. I just don't want
2 anyone to think that we're going to be done by June
3 26th. That's physically impossible.

4 THE COURT: You understand that?

5 MS. KESSLER: I understand that as far as
6 the letters where we specified the deficiencies that
7 we're seeing in the responses themselves. But our
8 cross-motion does have specific documents that we have
9 been seeking for many months that go beyond that. And
10 a lot of this actually, Your Honor, dates back to your
11 order from December, that you ordered that the
12 defendants provide all adverse event reports. They
13 still have not complied with that.

14 So there are specific documents that we set
15 out in our cross-motion that we are seeking that we
16 would like a set deadline for the defendants to be
17 producing this information, because we have been
18 waiting this long.

19 MS. SHARKO: I think the better approach,
20 Judge, is that we meet and confer and see what's at
21 issue. For example, you denied the plaintiffs' motion
22 to compel the production of every adverse event report.
23 You instead ordered, back in October, that we produce
24 all the adverse event reports for certain categories.

25 THE COURT: Correct.

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1 MS. SHARKO: And we've done that. We've
2 done that. We did that months ago.

3 So this is why I think we need to meet and
4 confer with Ms. Kessler over her 84 pages of letters.

5 THE COURT: Well, I agree, but let's
6 overlay on that conversation that the older or the
7 longer her request is outstanding, then the better, the
8 more urgent the need for an explanation as to why it
9 remains outstanding. If it remains outstanding because
10 you can't find it or haven't been able to put it
11 together, or it remains outstanding because we haven't
12 given it to you, we're never going to give it to you.
13 So, I mean, we need to know the difference. And maybe
14 you can resolve that at the meet and confer. But the
15 older the request, the longer it's outstanding, then
16 the more determined I am to get it resolved.

17 MS. SHARKO: I understand that.

18 And I just want to note that we responded
19 to the discovery request about six months ago and we
20 heard nothing from the plaintiffs. They did not have
21 any complaints or issues. The first letter --

22 THE COURT: In response to the rolling
23 furnishing of documents, you're saying?

24 MS. SHARKO: Right.

25 THE COURT: Thus far there have been -- all

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1 right. But in their moving papers, they're pointing to
2 specific requests that they think have been outstanding
3 for a while.

4 MS. SHARKO: Right. And so we got that
5 letter a week or two ago. It was 80-some pages long.
6 And we'll meet with her -- as we told her when we got
7 it, we would meet with her and try and get these issues
8 resolved by the end of May.

9 So you've given us an extra 26 days. We
10 appreciate that. And we will do that.

11 MS. KESSLER: Your Honor, again, some of
12 these disputes -- I mean, Ms. Sharko is trying to say
13 that we just told them about this last week. That's
14 not true. I mean, I know that you received the letters
15 back in January a couple weeks after they were
16 compelled to produce this information. We reviewed the
17 documents that we received, and we noticed that we are
18 missing information.

19 The adverse event data, as to the
20 limitations that were placed on it, Your Honor, we
21 don't have all that information yet. They haven't
22 complied with that. And it's the same for the FDA
23 communications; we're still waiting for correspondence
24 that the defendants had with the FDA, you know, again,
25 information that's readily available to them that's not

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1 being produced.

2 Another issue, Your Honor, is that there is
3 a Department of Justice civil settlement reached in
4 January. We didn't find out from the defendants, even
5 though we served requests, as to that information. We
6 found out from the news, from the Department of Justice
7 website, that they and Daiichi reached a civil
8 settlement, \$39 million involving kickback allegations.

9 We don't have a single document related to
10 the investigation that went on for four years with the
11 Department of Justice, with multiple subpoenas served,
12 not only on Daiichi, but also the Forest defendants.
13 We have no information from them. I have information
14 from the docket and from the Department of Justice
15 website, you know. And this is something that they
16 clearly have, you know, that should be provided.

17 THE COURT: Well, her client clearly has
18 it. It doesn't mean Ms. Sharko has it.

19 MS. SHARKO: So if I could respond.

20 THE COURT: Go ahead. Yes, you can
21 respond.

22 MS. SHARKO: We have produced the adverse
23 event reports. We have produced the FDA
24 correspondence. I'm surprised to hear Ms. Kessler say
25 that. So I think we need to sit down and maybe we can.

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1 again show her where this is in the document
2 production.

3 In terms of the civil settlement, we
4 amended our interrogatory answers to reference that.

5 THE COURT: You did? Okay, good.

6 MS. SHARKO: Yes. There are no discovery
7 requests that deal with that. If she wants documents
8 related to that, we'll figure that out.

9 THE COURT: No, hold on. Shouldn't she be
10 able to make a FOIA request for those documents too?

11 MS. SHARKO: Can she make a FOIA request?
12 Sure.

13 THE COURT: To the Department of Justice.

14 MS. KESSLER: For the Department of
15 Justice?

16 THE COURT: Yeah.

17 MS. KESSLER: But it's more than that, Your
18 Honor. I mean, I'm not only looking for the
19 communications that happened with the Department of
20 Justice and the defendants. And a request like that
21 could take years for the Department of Justice to
22 provide information.

23 THE COURT: Well, hold on, hold on. We all
24 know that in the Anglo-Saxon tradition of the law,
25 there is a strong preference for settlement of

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1 litigation. And we all know that in settling
2 litigation, it oftentimes happens that certain things
3 remain confidential because the parties' attitude is
4 that, well, if this case had been litigated, it might
5 have turned out a whole lot different; but because we
6 decided not to litigate it, we've agreed that you're
7 not going to learn about these things. So, you know,
8 keep that in mind. That happens at lots of different
9 levels --

10 MS. KESSLER: I know.

11 THE COURT: -- you know, not just in these
12 types of proceedings where, you know, everybody agrees,
13 we won't litigate because it makes more sense to
14 settle, but in settling, we want what we've shared with
15 one another in terms of showing our hand, we want that
16 to remain confidential.

17 So I don't know what happened with the
18 Department of Justice. I'm sure I'll find out to some
19 extent. So keep that in mind. I don't know how
20 forthcoming they have to be until we know how it was
21 settled.

22 MS. KESSLER: Well, we do know how it was
23 settled.

24 THE COURT: Go ahead, tell me.

25 MS. KESSLER: There was a public

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1 announcement. There's a corporate integrity agreement
2 that the defendants agreed to sign. I have that from
3 the docket. A lot of this information is released, and
4 I'm not sure that the Department of Justice even agreed
5 to a confidential settlement with those terms. I think
6 the purpose of it is to make the public aware that this
7 kickback, you know, bribery scheme existed among the
8 promotion of these drugs and that the public is
9 entitled to this information.

10 But even if that information is
11 confidential --

12 THE COURT: But let me be candid with you
13 about that. Isn't that really a side issue, too,
14 though?

15 MS. KESSLER: It's not a side issue, Your
16 Honor.

17 THE COURT: Not a side issue?

18 MS. KESSLER: Because it has to do with the
19 promotion of these drugs. It has to do with the
20 contact that this company had with the physicians who
21 prescribed this drug to our plaintiffs directly.

22 THE COURT: Yeah. But at the end of the
23 day, you're going to have to have a credible hypothesis
24 for the biological mechanism of Benicar and a
25 bellyache. Right? At the end of the day, that's where

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1 we are. So that's a side issue to that issue.

2 I mean, I'll never discuss that issue at a
3 Kemp hearing, will I?

4 MS. KESSLER: Well, it's not a causation
5 issue.

6 THE COURT: Right? So it's kind of a side
7 issue from my perspective.

8 MS. SHARKO: It is.

9 THE COURT: It may become relevant at
10 another time, I don't know. But right now, you know --

11 MS. KESSLER: Your Honor --

12 THE COURT: -- I support your request to
13 get the information. And she knows she has an
14 obligation to be forthcoming on the information.

15 If we get to a point where she has
16 furnished information --

17 She has to propound an additional request,
18 is that what you're saying?

19 MS. SHARKO: Yes.

20 THE COURT: You amended your answer to say
21 there was a settlement?

22 MS. SHARKO: Right. And so now, if the
23 plaintiffs want -- we're here arguing about documents
24 that they haven't asked for, for production. So if the
25 plaintiffs, knowing about this from us and knowing

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1 about it from the news, want specific documents
2 related --

3 THE COURT: They should ask for them.

4 MS. SHARKO: They should ask for them.

5 THE COURT: I agree.

6 MS. SHARKO: And we will respond.

7 THE COURT: And I gather they're going to.

8 MS. KESSLER: We did ask for them, Your
9 Honor. It's Request Number 15. Defendants have not
10 produced any documents relating to other lawsuits
11 filed. They claim privilege.

12 MS. SHARKO: There was no lawsuit filed.

13 THE COURT: Hold on, hold on. That's
14 pretty --

15 MS. KESSLER: This was.

16 THE COURT: Other lawsuits filed, I might
17 read that and say other personal injury claims.

18 MS. KESSLER: Well, then let me take a step
19 back.

20 THE COURT: I don't think I would read that
21 in this context of this lawsuit, claims brought by the
22 United States government.

23 MS. KESSLER: It wasn't brought by the
24 United States government. So I could give a little bit
25 of history of it. It was a whistleblower suit --

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1 brought by a Michigan sales representative who filed
2 consumer -- filed a Fraud Claims Act.

3 THE COURT: All right. Hold on. We are
4 digressing. And we don't need to do that.

5 I think what we need to do is for you to
6 sharpen your request for information concerning that
7 settlement and give Ms. Sharko the opportunity to
8 reply.

9 MS. SHARKO: Thank you.

10 MR. SLATER: And if I could, Your Honor --

11 THE COURT: Mr. Slater is eager to say
12 something.

13 MR. SLATER: I think that what Your Honor
14 has suggested -- I think that question does cover it.
15 Just so you know, a civil suit was filed, it was a qui
16 tam action by a whistleblower --

17 THE COURT: All right. But I just told
18 her, that's a digression.

19 MR. SLATER: I get it. I just wanted you
20 to know --

21 THE COURT: Okay.

22 MR. SLATER: -- they'll have a request in
23 their hands by Monday.

24 THE COURT: Good.

25 MR. SLATER: A 30-day request. And then

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1 we'll come before Your Honor. I agree. It's not going
2 to be the subject of a Kemp hearing, probably be the
3 subject of our punitive damage closing at trial.

4 THE COURT: You never know. You never know
5 where these things go. But I want to try to stay
6 focused, because what my goal is, to get everybody have
7 the discovery that they're entitled to, to have
8 depositions of the fact witnesses, get your reports
9 from your experts -- and I don't have a date in mind
10 for that -- get your reports from your experts, get
11 their reply, have depositions of the experts. Isn't
12 that the logical progression? That's where we have to
13 go.

14 MS. SHARKO: It is. And to that end, there
15 are 18 cases where discovery responses are overdue,
16 15 of -- 16 of Mr. Slater's, a whole list of Ms.
17 Kessler's. And so if we could have an order compelling
18 plaintiffs to respond to all outstanding discovery
19 requests within a reasonable period of time.

20 THE COURT: I see smiles from both your
21 adversaries. Tell me what's your problem with that.

22 MR. SLATER: I have an attorney who is
23 asking to compel discovery against me when no motion
24 has been filed.

25 MS. SHARKO: That's what we just did.

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1 MR. SLATER: Well, hang on. There's
2 absolutely --

3 THE COURT: Well, no.

4 MR. SLATER: I don't agree that we have any
5 discovery outstanding. In fact, I got a letter a
6 couple days ago from Ms. Sharko's associate in the
7 Anzalone case, which is the first case I filed here in
8 New Jersey, asking us when we're going to serve our
9 Form A interrogatory answers and supplemental
10 interrogatory answers. I think they were served about
11 seven months ago. It was -- they obviously need to
12 check their files, but --

13 THE COURT: She's shaking her head no.

14 MR. SLATER: I'm not --

15 THE COURT: And you'll have a paper trail
16 if they were.

17 MR. SLATER: Yeah. I mean, they need to
18 file a motion if they want to compel discovery from me,
19 because I'm not deficient on anything. And I just --
20 there's no issue there.

21 MS. SHARKO: Well, we sent Mr. Slater a
22 letter back in April. He owes us interrogatory
23 answers, document requests, preliminary discovery forms
24 for the Avery case, the Dom case, the Evans case, the
25 Lewis case, the Menyweather case, the Parker case, the

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1 Pitts case, the Robinson case and the Taylor case.

2 MR. SLATER: I don't litigate this way,
3 Judge, walk in -- you know what's going on. If she
4 wants to file a motion --

5 THE COURT: I don't know what's going on,
6 other than we're having a pretty free discussion. And
7 I'm okay with it. This doesn't unsettle me.

8 But in looking at my own notes, one of the
9 things I'm going to add to it is that after you meet
10 and confer, we will have a conference call, which may
11 be preceded by you giving me your submissions, as to
12 where we're having problems, and we will then have an
13 on-the-record management conference. And we'll
14 probably, you know, figure out that date today, before
15 we're through here.

16 MS. SHARKO: Okay.

17 THE COURT: But, again, you have said in
18 your responsive pleadings that there are -- I think
19 it's 156 requests for production that you will respond
20 to between now and I've extended it to June 26th. You
21 have said there's information that you're going to
22 provide, and you're going to get that case-specific
23 information and the other production information
24 between now and June 26th.

25 And then within that time frame, because

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1 you're going to be knowing what you're producing and
2 what you aren't, you're going to meet and confer. And
3 then on June 26th, by that date or before, you're going
4 to know where we're at loggerheads, where you're at
5 loggerheads and where you aren't. Okay? And then
6 we'll talk about that on the phone, and then we'll meet
7 to see how we can resolve this.

8 MS. SHARKO: Thank you.

9 MS. KESSLER: Your Honor, I think the most
10 efficient way to do that is, from the plaintiffs' side,
11 with these requests that are in the proposed order that
12 they're claiming need to be compelled, is for us to
13 meet and confer as to a fact sheet that can apply
14 uniformly across all these cases.

15 THE COURT: Well, I think that needs to be
16 done.

17 MS. KESSLER: Along with --

18 MS. SHARKO: So here's the issue, Judge --

19 MS. KESSLER: I'm sorry, I --

20 THE COURT: Go ahead.

21 MS. SHARKO: We have had discovery requests
22 outstanding to the plaintiffs in many cases for many
23 months. And what would be unfair is to say, all right,
24 forget about all that. Now, spend a month agreeing to
25 a fact sheet and then start the clock running again.

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1 So I absolutely favor the fact sheet that
2 will be negotiated in the MDL between these same
3 lawyers, having that apply in this litigation
4 prospectively, but I don't think for all the cases
5 where we're waiting for discovery, which is over 20
6 cases, we should stop.

7 THE COURT: Do you have the fact sheet
8 that's being used in the MDL with Judge Kugler?

9 MS. SHARKO: That is just an idea right
10 now. I actually do have a draft that I'm working on
11 that my plan is to send to the plaintiffs --

12 THE COURT: I was going to say, have you
13 shared it with the plaintiffs?

14 MS. SHARKO: No. I'm not ready to do that
15 yet.

16 THE COURT: All right. Once you share it
17 with the plaintiff and the plaintiff has responded,
18 then share it with me.

19 MS. SHARKO: Sure.

20 But I don't think that -- what I'm
21 concerned about, and I agree that once it's agreed upon
22 we'll use that going forward, but what I don't think
23 should happen is all case-specific discovery from the
24 plaintiffs is now suspended while we do that. The
25 plaintiffs who have discovery requests, and have had

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1 them in some cases for 30, 60, 90 days, should be
2 answering them. And in the future cases --

3 THE COURT: I don't disagree with that, but
4 Mr. Slater is saying there isn't any outstanding from
5 his clients.

6 So are there any outstanding from your
7 clients, Ms. Kessler?

8 MS. KESSLER: I don't -- not that I know
9 of. I don't know what specific cases she's talking
10 about.

11 You know, we have -- every time they have
12 sent me a letter saying that we're deficient or that
13 we're not responding, I have done my best to answer
14 them. And that to address this, I did switch law
15 firms. You know, they were kind enough, they gave me
16 some extensions on a few cases. I complied with all
17 the extensions that they've given me, I've served
18 within those time periods. You know, in addition that,
19 I don't know which cases that she's speaking to.

20 But as far as going back in time, what Ms.
21 Sharko is saying is that, again, the proposed orders,
22 the questions that she's moving to compel, the
23 information that she says that isn't sufficient that
24 we're not supplying, we disagree. We have a
25 disagreement about that.

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1 And then on top of it, some of these
2 questions are just clearly inappropriate.

3 THE COURT: Well, they're inappropriate
4 or -- I mean, inappropriate is a judgmental thing. And
5 maybe I have to decide that. I would prefer not. I
6 would hope you'd be able to decide it.

7 But duplicative is another thing. I don't
8 see the point of redundancy ever.

9 MS. KESSLER: I agree. And I think that's
10 why, if we worked out a fact sheet where we can settle
11 on this universe of what the discovery in these cases
12 should be, is the most efficient solution to this,
13 rather than us coming back here and Ms. Sharko claiming
14 she didn't get a response to Document Number 14 -- or
15 Request Number 14, which requests all documents
16 relating to Benicar in plaintiff's possession,
17 plaintiff's agents and plaintiff's lawyers. And we
18 have a serious fundamental problem with that question,
19 along with other questions that she's compelling.

20 You know, one of the questions is she wants
21 the identities and names of all of our experts. That's
22 in their proposed orders. So it's just --

23 THE COURT: You'll get it at some point.

24 MS. KESSLER: Absolutely, Your Honor. But
25 at this time --

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1 THE COURT: I'm not going to hold -- I'm
2 not going to hold them to a specific date right now. I
3 think that's a little bit premature.

4 MS. SHARKO: I agree with that.

5 THE COURT: Okay.

6 MS. KESSLER: Then, again, that's in their
7 proposed order.

8 MS. SHARKO: The Robins Kaplan firm has had
9 the Keeler case, and we don't have any discovery
10 responses in. They were served December 16th.

11 I have -- I mean, I have a list here of who
12 owes what. My only point is that we should not suspend
13 everything while a fact sheet is worked out. Because I
14 assume that if we agreed on a fact sheet on June 1, are
15 the plaintiffs then going to go back and fill out that
16 fact sheet for every single case in the litigation,
17 including those where they've answered interrogatories?
18 If they're willing to do that, I might be more
19 interested in it.

20 THE COURT: Here's the thing. I think it's
21 in both of your -- in both your interests, to the
22 benefit of both of you, to have uniformity.

23 MS. KESSLER: Absolutely.

24 THE COURT: It expedites the handling of
25 information. It expedites the understanding of

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1 information. And so, you know, I'm mildly chagrined
2 that we don't have it already. I mean, I think we'd be
3 a lot better off if we had -- you'd be a lot better
4 off, you'd be a lot better off, if we had an
5 agreed-upon plaintiffs fact sheet.

6 MS. KESSLER: Absolutely, Your Honor.

7 THE COURT: I know I'd be -- it makes it a
8 lot easier for me.

9 MS. KESSLER: Absolutely. And we'd be
10 happy to adopt --

11 MS. SHARKO: So what --

12 THE COURT: You're both talking at the same
13 time.

14 MS. SHARKO: Once we have an agreed-upon
15 fact sheet then, it will be completed by every
16 plaintiff in the New Jersey litigation, regardless of
17 whether they've answered interrogatories?

18 THE COURT: Yes, yes, yes. It's going to
19 make it a lot easier going forward.

20 MS. SHARKO: Okay.

21 THE COURT: If it requires you to duplicate
22 some effort on individual plaintiffs, so be it. But
23 going forward, it makes things a lot easier. It really
24 does.

25 MR. SLATER: Should we suspend answering

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1 interrogatories while this meet and confer process goes
2 on, so we don't duplicate effort?

3 THE COURT: Now, I don't want you
4 duplicating efforts.

5 MR. SLATER: That's the problem.

6 THE COURT: But I want you to focus on --
7 have you given them your thoughts on a plaintiff fact
8 sheet?

9 MS. SHARKO: The plaintiff fact sheet was
10 first raised by Judge Kugler on April 29.

11 THE COURT: Good.

12 MS. SHARKO: And we're supposed to meet and
13 confer before May 20.

14 So, no, I haven't. But I really don't want
15 to have everything stop in New Jersey. There's no
16 reason the plaintiffs can't give us medical records
17 authorizations or the basic information about their
18 cases. I believe that each plaintiff should be
19 supplying proof that they took the product and they had
20 an event.

21 We have in -- out of the 59 cases in New
22 Jersey, only 23 plaintiffs have provided prescription
23 records that show a Benicar prescription and event
24 records that show a diagnosis.

25 MS. KESSLER: Okay. Well, that's very

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1 misleading because there's four medications here.

2 THE COURT: That's a perfect example. The
3 other 36 are going to have to prove they took the
4 medication. Right? You know, you're not going to be
5 able to come in here and say, oh, well, I'm pretty sure
6 it was.

7 MS. KESSLER: Your Honor, that was --

8 MS. SHARKO: If I could finish --

9 MS. KESSLER: -- so misleading, because
10 there are four medications that contain the drug
11 ingredient in question. It's not just Benicar. It's
12 Benicar, it's Benicar HCT, Azor and Tribenzor. So
13 she's saying that 23 may have taken Benicar. There's
14 three other medications at issue.

15 THE COURT: But here's what she said to me.
16 That there's 59, and out of those, we have 26. So that
17 tells me there's -- did you say 23?

18 MS. SHARKO: There are 23.

19 THE COURT: So we have 36 that haven't
20 responded. Those 36 people are going to have to prove
21 they ingested something that hurt them. Right?

22 MS. KESSLER: Absolutely.

23 THE COURT: Okay. Well, the sooner she
24 knows that, then the more respect she'll have for the
25 claim.

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1 MS. KESSLER: I think we're talking about a
2 short time frame. And I think that as far as the
3 uniformity that you're suggesting makes absolute sense.
4 And that what's being implemented in the MDL, which is
5 on a very short-term basis here, we're talking May
6 20th. And we're also drafting a plaintiff fact sheet
7 that Ms. Sharko will see too.

8 And we think that which is implemented in
9 the MDL should also apply to these cases. And that we
10 can work that out in a very short period of time.

11 THE COURT: I do think that's the
12 preferable way. I also think, she raises a point, that
13 some things you're going to have to provide on any fact
14 sheet that's agreed upon. And so the sooner she has
15 those things, the more sense it makes in terms of
16 expediting the process.

17 MS. KESSLER: Okay. We could agree to --

18 MS. SHARKO: So what I --

19 THE COURT: Let her finish and then you can
20 go.

21 MS. KESSLER: We could agree to produce the
22 Form A interrogatories, which is where the medical
23 records are first produced, along with the medical
24 authorization and the employment authorization in the
25 meantime, while we work out the fact sheet.

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1 THE COURT: I think you need the medical
2 authorizations. And the Form A should get you started,
3 shouldn't it?

4 MS. SHARKO: Yes, sir. What I would really
5 like to have in addition to the authorizations is for
6 each plaintiff a medical record that shows that they
7 had a prescription for Benicar or Tribenzor or Azor or
8 one of the Benicar products and a medical record that
9 shows the diagnosis of sprue-like enteropathy or the
10 event that they claim in the lawsuit. It's three
11 pieces of paper.

12 THE COURT: Well, I agree with you.
13 Because, I mean, the things that she just said, why
14 would you file a lawsuit for them if you didn't have
15 it. Right?

16 MS. KESSLER: Well, it's more complicated
17 than that. And this was part of her motion to dismiss
18 a case six months ago. She is trying to strategically
19 narrow what she thinks this litigation is about. It's
20 not sprue-like enteropathy.

21 THE COURT: I remember that conversation.
22 And my response then is my response now. There may
23 be -- I don't know what they are, but that's up to them
24 to prove it, not for you. There may be some other
25 named condition that, you know, they're going to be

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1 able to show was connected to the Benicar. Well, maybe
2 whatever it is. But you're going to have to articulate
3 that at some point. Right?

4 MS. KESSLER: Absolutely, Your Honor. And
5 I think the other --

6 THE COURT: And the other -- you know, I'm
7 saying to myself, before a suit gets filed on behalf of
8 a plaintiff who took Benicar, saying that that
9 substance injured me, you should have proof that they
10 took the substance and you should be able to articulate
11 to some degree what the injury was or you shouldn't be
12 filing the Complaint.

13 MS. KESSLER: Exactly. And I can tell you
14 that all plaintiffs' counsel here have been carefully
15 vetting the cases that have been filed and that
16 information is being collected.

17 THE COURT: I sure hope so. It doesn't
18 always happen.

19 MS. KESSLER: You know, this is right now a
20 pretty small, manageable amount of cases. There are 60
21 cases on file. So there is no reason that we can't
22 streamline this and make this uniform, along with
23 what's going on in the MDL.

24 But in addition to the plaintiff fact
25 sheet, Your Honor, there's also the defense fact sheet.

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1 And that's also being worked on in the MDL, and it
2 should also apply here.

3 THE COURT: Yes.

4 MS. KESSLER: And this is very -- it's very
5 important too, because we have been serving all these
6 requests in multiple cases. However, the defendants
7 have taken the position that they don't have to
8 apply -- answer to any case-specific discovery except
9 in Rahman, except two questions that they unilaterally
10 decided are case specific.

11 So they have already implemented their own
12 uniform system of answering, and yet they're expecting
13 from us to be providing this discovery that's
14 duplicative and what I believe a lot of is
15 inappropriate.

16 So I just think that we need a meet and
17 confer both on the plaintiff fact sheet and the defense
18 fact sheet, and we can come back in a very short period
19 of time and have this worked out as to what the
20 universe of this discovery should be.

21 MS. SHARKO: So what --

22 THE COURT: Well, I'm happy to hear that
23 Judge Kugler is a step ahead of me on the fact sheets.
24 And that's probably going to get resolved in front of
25 him quicker than it will get resolved in front of me,

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1 and then we'll just piggyback on whatever gets prepared
2 there.

3 MS. SHARKO: That's fine, Judge. And we'll
4 do that.

5 I would ask, though, that in the interim
6 the plaintiffs be ordered to produce for each case the
7 medical record showing a prescription of the product
8 that they received --

9 THE COURT: I think that's a fair request.

10 MS. SHARKO: -- or whatever.

11 THE COURT: I think that's a fair request.

12 MS. SHARKO: And number two, the medical
13 record documenting the event for which they seek
14 compensation. It should be sprue-like enteropathy, but
15 if it's something else, whatever that is.

16 THE COURT: Or whatever the condition may
17 be that they're saying caused --

18 MS. SHARKO: Exactly, exactly.

19 THE COURT: -- was caused by the ingestion
20 of this medication. You should have that information.
21 This is no big task. You should have it.

22 MR. SLATER: I think that after this
23 afternoon, some of these issues will be a little more
24 clear in terms of why it seems like we're arguing over
25 semantics, but we're really not. So I would ask Your

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1 Honor to wait and see what you learn this afternoon
2 about what's really going on.

3 And, for example, what Ms. Sharko was
4 telling you, if a person doesn't have a diagnosis of
5 sprue-like enteropathy, and you're ahead of the game on
6 that, you know they don't have a case, well, one of the
7 problems here is the information was never given to
8 doctors, even the information that they put into their
9 label, which is we don't believe adequate to begin
10 with. Unlike in Accutane, where Your Honor ruled that
11 the warning system was very extensive, here we're going
12 probably be able to demonstrate to Your Honor, if we
13 find what we think we're going to find and if our
14 investigation bears out, they had a system of
15 suppression of the science and medical information
16 about their products.

17 So, for example, I have clients signing up
18 with me now, they found out about the problem a week or
19 two ago in a conversation, or jumping on the internet
20 and said, I didn't even know this. I had to take a new
21 drug. I got switched off by my insurance. My problems
22 went away, I never even made the connection until I saw
23 something on the internet. So it's not that simple
24 because doctors didn't know to diagnose. They didn't
25 know to do pathology. They didn't know to take

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1 biopsies. They didn't know this even existed. There
2 was a couple of articles in the literature that most
3 doctors would never have seen. And you'll learn about
4 that a lot this afternoon. So it's a more complex
5 process.

6 The idea that they want this quick slip
7 sheet in the beginning of the case, we actually argued
8 this issue in Anzalone, and Your Honor agreed, you're
9 going to get the responses to the interrogatories, all
10 the information is going to be there in the ordinary
11 course, and that's how we think it should be done.
12 There shouldn't be staged discovery responses. There
13 should be a fact sheet, and if there were
14 interrogatories already answered, they have the
15 information. If they think there's a deficiency, they
16 can raise it.

17 THE COURT: Well, there's merit to what
18 both of you say, but I'm still of the opinion that some
19 of the things that Ms. Sharko is asking for are things
20 that should be in your file.

21 MR. SLATER: Well, some of it --

22 THE COURT: They should exist. Right?

23 MR. SLATER: Your Honor, we have to get all
24 the medical records. You file a case, sometimes
25 there's a statute of limitations coming up potentially.

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1 THE COURT: You give her all the names of
2 the physicians, you give her medical authorizations.

3 MR. SLATER: And she's getting all that.
4 She gets that when we answer interrogatories. They get
5 everything in the ordinary course. If there's a fact
6 sheet, they'll get it with the fact sheet. The
7 idea that we should have to make --

8 And Judge Kugler, by the way, disagreed
9 with this as well. She asked for staged responses, and
10 his response was, let's do it once. So -- and I'm sure
11 you can speak with him, obviously there's a transcript.
12 We're happy to give all this information one time in an
13 ordinarily fashion en masse, the way it's done in every
14 litigation, as opposed to Ms. Sharko cherry picking a
15 few bits of information and trying to define what she
16 wants.

17 THE COURT: I wouldn't characterize it as
18 cherry picking. I think what she's saying is these are
19 the fundamentals and we need to have them.

20 But you know what? You're going to get it.
21 You're going to get all this information or their
22 claims will get dismissed. It's just that simple. And
23 so I think once we have the fact sheet agreed upon,
24 we'll agree upon a reasonable time for them to file
25 fully responsive answers to the fact sheets, and that

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1 will be it. And if they can't, because they don't have
2 a prescription, then those cases are going to go away
3 quick.

4 MS. SHARKO: So I agree that this
5 information will be in the fact sheet, or should be in
6 the fact sheet, but the problem is that we've served
7 discovery in all these cases. We have 36 plaintiffs
8 who have had discovery requests pending.

9 THE COURT: Outstanding and remain
10 outstanding?

11 MS. SHARKO: And remain outstanding. And
12 now what the plaintiffs want to do is stop
13 case-specific discovery. So all I'm saying is --

14 THE COURT: Here's the flip side of that.
15 The flip side of that is they've got 23 they're going
16 to have to go back and duplicate. That's the flip
17 side. And I can see that sitting here. You know, my
18 vantage point sometimes is different. And I'm saying,
19 you're going to wait a little bit longer for 36 and
20 they're going to have to duplicate 23. In terms of,
21 you know, how the scales balance, they're in equipoise.
22 You're each one inconvenienced equally. So it's just
23 that simple.

24 So when the fact sheet is prepared, we'll
25 talk about a reasonable amount of time in which

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1 plaintiffs will have to furnish you with everything
2 that's listed on the fact sheet. But in the meantime,
3 you'll have to be patient a little bit longer.

4 MS. SHARKO: Could we have authorizations
5 at least in the pending cases while the fact sheet is
6 negotiated?

7 MR. SLATER: They have them.

8 THE COURT: I admire your persistence. I
9 admire it. I really do. The answer is no. We'll wait
10 and do everything once with the fact sheet.

11 Okay.

12 MS. KESSLER: Thank you, Your Honor. Just
13 two more issues. I'm sure you're about to turn to the
14 FOIA documents.

15 The first is that with the medical
16 authorizations that we've been giving the defendants --

17 THE COURT: You've given 23 so far?

18 MS. KESSLER: I think -- I don't know how
19 many I've given.

20 THE COURT: All right. Hold on. She's
21 being persistent and I admire that, and if we can
22 handle it, is there any reason you can't give medical
23 authorizations on the rest right away?

24 MS. KESSLER: Well, I mean, some of them
25 aren't even due yet.

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1 But the point that I was making is that the
2 medical authorizations that we have supplied, they're
3 clearly getting records, they're gathering records.
4 And we've also signed facility-specific authorizations
5 where they don't accept the general authorization, so I
6 know that they're getting this information. They have
7 not produced any of the records that they are receiving
8 on our plaintiffs.

9 THE COURT: I don't have any doubt that
10 they will.

11 MS. KESSLER: Well, prior --

12 THE COURT: Maybe they're waiting until
13 they get a certain bundle, of a certain number.

14 MS. SHARKO: So here --

15 MS. KESSLER: It's part of our problem,
16 Your Honor, that we believe that this should be on a
17 rolling basis --

18 THE COURT: You can't both talk at the same
19 time. It's hard for her and hard for me.

20 MS. KESSLER: Well, that this information
21 is being -- that as this information comes into the
22 defendants -- again, it's usually something that's
23 agreed to in the ordinary course. We just ask Your
24 Honor that it's something that I guess we will meet and
25 confer about this, too, and have -- make sure that

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1 we're receiving all the information that they're
2 receiving on our plaintiffs as well, because these
3 authorizations don't have the limitations as to the
4 time period that we just discussed today.

5 MS. SHARKO: So this is a good example of
6 why we have the rules of court. Ms. Kessler never,
7 ever asked for a copy of a single medical record until
8 she filed her cross-motion.

9 MS. KESSLER: That's not true.

10 MS. SHARKO: As she pulled up --

11 THE COURT: So you can really -- I really
12 don't like you interrupting her when she's talking.
13 And she interrupts you too. You both need to stop it.

14 MS. SHARKO: Had Ms. Kessler called or
15 asked, and now that she has, we will supply her with
16 copies of the medical records we get as we get them,
17 pursuant to the Vasquez case where they share in the
18 cost of whatever we paid --

19 THE COURT: I saw that in your response,
20 and I think that's how it should be done.

21 MS. SHARKO: That's how it's always done
22 here. I've never had an issue with that. So I was
23 kind of surprised that I didn't get a phone call, I got
24 a motion, but that's not an issue for the Court.

25 MS. KESSLER: I just want to correct for

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1 the record, I did ask for that information in a letter
2 in late January.

3 THE COURT: Well, she's telling you she's
4 going to provide it, you're going to share in the cost
5 and you'll be receiving the information.

6 MR. SLATER: I'm sorry, Your Honor, I just
7 want to make sure that something is clear in the
8 record.

9 If Ms. Sharko is asking that she goes out
10 and gets the plaintiffs' medical records, which I
11 believe that she's obligated to then give to us, she's
12 now saying she wants us to share in her cost of
13 obtaining the records? Because I know we've been
14 obtaining our clients' medical records and serving them
15 in the ordinary course. And I've never had a
16 litigation -- Ms. Sharko says it's ordinary? I have
17 never had the defendant charge me in the state of New
18 Jersey, where I've practiced law almost exclusively for
19 almost 25 years, try to charge me for medical records
20 they obtained for my clients with my medical
21 authorizations. They always produced the records that
22 they obtain, and we produce the records we obtain. And
23 I do not want the record to leave -- be left that all
24 the attorneys in the litigation --

25 THE COURT: Well, I appreciate you doing

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1 this, because, candidly, it's never become an issue for
2 me before because lawyers have agreed. And what
3 lawyers agree to, I don't tamper with, unless somehow
4 it's violating public policy, but...

5 Ms. Sharko, you've got the floor.

6 MS. SHARKO: So in every litigation I've
7 ever been involved in, and I guess I've never had the
8 pleasure of being in litigation with Mr. Slater
9 before --

10 THE COURT: You were in a different
11 universe, but now you're in the same universe.

12 MS. SHARKO: Usually we use a medical
13 records provider, and we'll probably have to switch to
14 that here.

15 THE COURT: Correct. I've seen that done
16 before, Mr. Slater.

17 MR. SLATER: I'm not talking about that.
18 That's fine. And we're going to do that in the MDL.
19 There's going to be a medical records company that's
20 going to obtain records. But prior to the institution
21 of that, we're serving records, they're serving
22 records. Once we agree on a vendor, then the parties
23 share, because the vendor goes out and gets the
24 records. That's -- I'm not disagreeing with that. We
25 weren't talking about that.

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1 THE COURT: Well, that's what I assumed was
2 going on.

3 MR. SLATER: It never happened here. We
4 should confer about it.

5 MS. SHARKO: I'm not -- I wasn't finished
6 talking, but I'm happy to talk to the plaintiffs
7 privately and try and work this out.

8 THE COURT: This shouldn't be hard.

9 MS. SHARKO: Right.

10 THE COURT: This should be easy. And I
11 thought what was happening -- and I'm assuming things,
12 and it's wrong to do that. I thought what we were
13 talking about was a vendor that when you use, pay the
14 one half. When I read that, I said to myself, well,
15 she's got a vendor who is going to secure the records,
16 and when the documents come in, they split the cost.

17 MS. SHARKO: Right. That's how it usually
18 works.

19 THE COURT: That's how it usually works.

20 MS. SHARKO: Okay. We will talk.

21 MR. SLATER: We'll talk to them about it.
22 That's wasn't what I thought we were talking about
23 here.

24 THE COURT: All right.

25 MS. KESSLER: The other issue I had, Your

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1 Honor, and this was brought up in my papers, is that
2 when the defendants filed these motions, we now have
3 very personal information about the plaintiffs that not
4 only violated the court rules, because there's personal
5 confidential identifiers included in these filings --

6 THE COURT: You know, I understand that.
7 But I -- look, I know a lot of paperwork is going to go
8 back and forth between the two of you. And I don't
9 know that they violated the protective order unless you
10 tell them that this is protected information. And I
11 don't think you did that. So, I mean, what I don't
12 want to do is make a huge issue over something that may
13 have been an inadvertency on both sides and can
14 probably be remedied quickly.

15 I haven't been in this situation before.
16 What's the logistics? If there are documents, you go
17 down to the clerk's office, say, give them back, I'm
18 going to exchange something? I mean, because it sounds
19 to me like we're making a bigger problem out of this
20 than it is. And I'm not accusing anybody of doing
21 that. I'm simply -- I don't want to make a bigger
22 problem out of it than it is because who's going to
23 come in and look?

24 MS. KESSLER: Your Honor, I understand what
25 you're saying about the protective order, but that's

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1 separate. This also includes -- and, I mean, I am
2 genuinely concerned about identify theft of these
3 plaintiffs, because it has their insurance policy
4 numbers filed. It has, for Shelly Rahman, a whole page
5 of her psychiatric information now filed with the
6 clerk's office.

7 THE COURT: Well, I would prefer that not
8 be filed.

9 MS. KESSLER: And that was the whole
10 purpose that we were here last fall is to talk about
11 the admitted protective order. It works both ways,
12 Your Honor. Our information should also be protected.

13 THE COURT: Well, I don't disagree with
14 you. But I also know that it's rare -- but we have to
15 protect against the rare too. It's rare that anybody
16 comes in and they want to look at, you know, a pleading
17 filed in connection with a discovery motion. They come
18 in and want to look at Complaints. They come in
19 sometimes and want to see briefs. They come in and
20 they want to look at certifications. But do they look
21 at these types of pleadings? No.

22 MS. KESSLER: But, Your Honor, they do,
23 because other plaintiffs' counsel around the country
24 are litigating these cases, too. I know that runners
25 have been here getting these filings, our motions to

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1 compel for --

2 THE COURT: Well, you know more than I do.
3 And I'm not being facetious. You're enlightening me.
4 It's interesting.

5 MS. KESSLER: It happened, Your Honor.
6 And --

7 THE COURT: Ms. Sharko?

8 MS. SHARKO: Yes. If only Ms. Kessler
9 would call and try to work these things out instead of
10 coming down here and trying to cast blame on everybody.

11 The discovery motions were filed. The
12 information that was attached was never designated as
13 protected.

14 THE COURT: Well, see, I don't think it
15 was. That's part of it.

16 MS. SHARKO: That's part of it.

17 The second part of it is, the rules specify
18 what is personal identifying information. That was not
19 in the motion papers.

20 All that said, if Ms. Kessler wants that
21 information removed from the filings, or she wants to
22 substitute a redacted version, so what's in the clerk's
23 office is more satisfactory to her, I don't care.

24 THE COURT: I would prefer --

25 MS. SHARKO: That's fine.

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1 THE COURT: -- that be done.

2 MS. SHARKO: Sure.

3 THE COURT: And how it gets done doesn't
4 interest me, but I would prefer that it be done. She's
5 telling me that it's possible that people from law
6 firms send -- I'll use a better word, "investigators,"
7 to look at certain documents. And I would prefer that
8 anything that appears to be confidential information
9 not be available for those investigators to peruse.

10 MS. SHARKO: Sure. That's fine.

11 THE COURT: We're all in agreement on that.

12 MS. SHARKO: We are. And all she needs to
13 do is give us, or give the clerk's office what she
14 wants to substitute, let us see it and then they'll
15 take care of it.

16 MS. KESSLER: I don't --

17 THE COURT: I think the best way to
18 coordinate this, because I don't think we're talking
19 about a big volume of information, are we?

20 MS. KESSLER: It's the six motions that --
21 Christy Brooks' motion where they attached medical
22 records.

23 THE COURT: Total number of pages, what are
24 we talking about?

25 MS. KESSLER: It's probably 300 pages.

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1 THE COURT: Oh, you think that many?

2 MS. KESSLER: Well, with these motion
3 papers, with these six motions, along with Christy
4 Brooks -- where they attached the medical records of
5 Christy Brooks, which they try to characterize as --

6 THE COURT: My thought is, there ought to
7 be a way, maybe starting with an e-mail copied to one
8 another and then a conference call, there should be a
9 way that you can resolve this with Trish Allegretto and
10 her staff.

11 MS. KESSLER: Absolutely, Your Honor. I
12 think that the defendants should be the ones that
13 initiate that, because they're their motions that were
14 filed. I'm not sure if I can change what they have
15 filed with the clerk's office. So we can talk
16 procedurally how to do it.

17 THE COURT: Yeah, but hold on. You're the
18 one who's got the beef, so to speak, with the problem.
19 I would want you involved, if not supervising, if not
20 doing the substitution to eliminate the complaint.

21 MS. KESSLER: To the extent --

22 THE COURT: The beef. You know, I don't
23 mean the pleadings. Eliminate the problem that you
24 perceive. And I respect it.

25 MS. KESSLER: But to be the fair, I wasn't

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1 the one that violated the court rules.

2 THE COURT: Yeah, but I don't have any --
3 look, there are -- inadvertencies occur. And I'm not
4 here to talk about anybody whose conduct is improper,
5 because I think everyone is being advocates, and that's
6 what you're supposed to be.

7 But you can pinpoint the items that you
8 find to be a problem more readily than anybody. And I
9 would prefer that you do that with Ms. Allegretto,
10 keeping Ms. Sharko informed of what you're doing, and
11 let's just tend to the logistics of the problem as
12 quickly as possible. And I think you're the one who
13 can expedite it more quickly than anybody.

14 MS. KESSLER: Yes, Your Honor. So just to
15 clarify that some of these medical records and these
16 responses were served before the protective order, and
17 so they aren't marked as protected.

18 THE COURT: The simplest way might be just
19 pull those pages, period.

20 MS. KESSLER: Exactly.

21 THE COURT: If we have an incomplete filing
22 at the end of the day, we all know what the
23 incompleteness is about.

24 MS. KESSLER: Right. And I would like
25 those records to be --

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1 MS. SHARKO: And --

2 THE COURT: If it becomes the subject of an
3 appeal, then you supplement.

4 MS. SHARKO: I have no objection to that.

5 MS. KESSLER: And I would like Ms. Sharko
6 to accept that this information is confidential, that I
7 do not need to go back through these productions and
8 produce pages where I mark them as protected, that it
9 is clear from the amended protective order that medical
10 records with this information is protected and within
11 the purview of it.

12 THE COURT: Well, I think going forward
13 we're all in agreement on that, are we not?

14 MS. SHARKO: That all --

15 THE COURT: Well, any medical or
16 psychiatric records, they shouldn't be filed in
17 courthouses.

18 MS. SHARKO: If Ms. Kessler is now orally
19 designating all the medical records as subject to the
20 protective order, so be it.

21 MS. KESSLER: And interrogatory responses.

22 THE COURT: Okay. But in terms of cleaning
23 the record by, you know, expurgating or redacting,
24 whatever term you want to use, those pages, I'm going
25 to rely upon you to work with Ms. Allegretto and get

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1 that done.

2 MS. KESSLER: Yes, sir.

3 THE COURT: Okay. What else on discovery?

4 MS. SHARKO: I want to make sure I just
5 heard what counsel said.

6 So all interrogatory answers are now
7 subject to the protective order for both sides, in
8 addition to medical records and psychiatric records? I
9 just want to make sure I know what the ground rules
10 are.

11 MS. KESSLER: I would say as the amended
12 protective order specifies, that this includes all
13 personal information, medical information as to the
14 plaintiffs --

15 THE COURT: Well, we know it includes
16 Social Security, we know it includes medical records,
17 we know it includes Social Security, psychological,
18 psychiatric. What else?

19 MS. KESSLER: So that would include
20 potentially document requests as well, that information
21 that we're attaching to document requests. So it's
22 potentially all discovery responses that have been
23 served, including medical records, that contain the
24 information that's defined as protected in the amended
25 protective order.

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1 MS. SHARKO: I would just ask, designating
2 something under the protective order is significant,
3 and we need to make sure everybody --

4 THE COURT: It's not insignificant, you're
5 correct.

6 MS. SHARKO: And so rather than have Ms.
7 Kessler stand up and say on the record, and I want this
8 and I want this and it's somewhat vague, she should --

9 THE COURT: Yeah, you're going to do a
10 letter to Ms. Sharko.

11 MS. KESSLER: Okay. Thank you, Your Honor.

12 THE COURT: So we don't have any
13 misunderstandings in the future.

14 MS. SHARKO: Okay. The cases that have
15 discovery end dates that are coming up, could they be
16 suspended or readjusted for this?

17 THE COURT: I think we need to suspend them
18 and create a new discovery end date once we have the
19 agreed-upon fact sheets. I think that's the most
20 practical way to proceed. Otherwise, you know, we're
21 going to be having more dates expiring.

22 MS. KESSLER: The only issue with that,
23 Your Honor, is that two of them are expiring in June
24 and then a few more are expiring in July. So it's
25 something that we should think about addressing

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1 separately.

2 Part of this was when the cases were
3 consolidated. Right now there's currently 12 cases
4 that were consolidated by Judge Mendez here in Atlantic
5 County. And normally when there's a consolidation,
6 they take the last discovery end date and it applies to
7 the entire set of cases. I'm not sure why it didn't
8 happen here, but I think that's the easiest solution.
9 And we can send you a joint consent order on that.

10 THE COURT: I was going to say, I'm content
11 with zeroing in on those cases that have you concerned,
12 agreeing upon a date somewhere in the future, and
13 that's fine by me. Because once we have the fact
14 sheets, that's going to expedite everything.

15 MS. KESSLER: So we will send that back to
16 you within the next week.

17 THE COURT: All right. So you'll submit a
18 consent order?

19 MS. KESSLER: Yes.

20 THE COURT: Okay..

21 MS. SHARKO: Meanwhile the dates are
22 suspended in all the cases?

23 THE COURT: Can't hear you.

24 MS. SHARKO: The dates for -- the discovery
25 end dates are suspended?

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1 THE COURT: Yes.

2 MS. SHARKO: Okay, thank you.

3 I believe we're up to item -- I guess we
4 have the MDL status report, which I can give you, if
5 you'd like that, the docket report. And then the
6 Hudson County cases that are now being filed.

7 THE COURT: Well, why don't we do that
8 after we finish the one issue on the motions that we
9 have.

10 MS. SHARKO: Okay.

11 THE COURT: Isn't that where we are?

12 MS. SHARKO: That's true. I forgot about
13 that.

14 THE COURT: Who wants to start? The person
15 who is looking for the protective order or the person
16 who -- well, you know, we'll start with the person
17 looking for the protective order, because you have the
18 burden of proof.

19 MS. KESSLER: Your Honor, I know that we
20 had several -- we had two conference calls on this
21 earlier in the year. I think you know our position. I
22 think we set it out very clearly in our papers that
23 there is this case directly on point where one side
24 tried to receive FOIA documents that were requested,
25 and the Court said that clearly this is work product

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1 and that it reflects a grouping of what the parties'
2 mental impressions and opinions as to what's important
3 in the case and that this really goes towards legal
4 theory, not towards factual. Because as far as the
5 factual information is concerned, the defendants
6 already have these documents. They already know the
7 factual information. It's already given to them.

8 I don't think it's all been produced to me
9 yet, but that's a separate issue. So what they're
10 really seeking here and why they have zeroed in on
11 these documents is to why they think that is relevant,
12 you know, I'm not really sure I understand if there's
13 any relevancy other than it gives my opinions and
14 thoughts as to what documents are important to receive
15 from the FDA.

16 And so I really do believe that these are
17 work product and that it falls within the doctrine,
18 which means that the defendants need to be able to
19 prove that there's a substantial need under the court
20 rules for why they need these documents. And they
21 clearly aren't able to reach that because, one, they
22 can make their own FOIA requests. They can take my
23 request and make it themselves to the FDA and get the
24 same documents if they want. And, two, they already
25 have these documents anyway. So I don't think they're

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1 able to prove their burden as to what substantial need
2 there is in these documents.

3 THE COURT: Mr. Carroll?

4 MR. CARROLL: Good morning, Your Honor.

5 On November 6, 2013, Ms. Kessler sent a
6 Freedom of Information request to the FDA. She gave
7 that to us, to both of us, in October 2014. She
8 submitted that with a reply brief on the motion to
9 compel.

10 I don't agree that the Rhone-Poulenc case,
11 which is a 1991 Eastern District of Pennsylvania
12 unreported decision by the magistrate judge, is good
13 law. I don't agree that that case applies here.

14 Assume for the sake of argument that it
15 does. That case says the grouping of the request is
16 work product. That's what it says right in the last
17 page of the opinion. That's the phrase it uses,
18 "grouping."

19 I have the grouping. Got it back in
20 October 2014. Don't need anything else other than the
21 documents.

22 When we were on phone with Your Honor back
23 in December, you said this wasn't necessary for formal
24 motion. You warned Ms. Kessler that no one would ever
25 come into your courtroom for a trial and be surprised

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1 by documents.

2 THE COURT: Nobody is going to be surprised
3 if I can help it.

4 MR. CARROLL: I remembered that statement,
5 Your Honor. You didn't want Ms. Kessler to undergo the
6 expense of copying the document, so you told her to
7 give us a list. The list was specific. It had to be
8 enough of a list so that we could go back and identify,
9 from the millions and millions of pages of documents
10 that we have, what these were.

11 The list was not sufficient. After the
12 insufficient list was served, Ms. Kessler then, on
13 January 22nd, if I recall, sent you a letter citing the
14 Rhone-Poulenc case. We're not after work product. To
15 the degree that work product was involved, it was
16 provided.

17 THE COURT: I think everybody is going to
18 have to enlighten me as to what they think work product
19 is, because I think we have a definition.

20 MR. CARROLL: Well, again, I don't agree
21 that the Rhone-Poulenc case applies, I don't agree it's
22 good law. But if Ms. Kessler wants to ride that
23 case --

24 THE COURT: I'm in agreement with you that
25 I'm not bound by it. I think Ms. Kessler is in

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1 agreement with that also.

2 MR. CARROLL: Right. But that's all Ms.
3 Kessler has argued. Under Rhone-Poulenc, she doesn't
4 have to produce documents. Rhone-Poulenc's stance for
5 the proposition that she doesn't have to produce the
6 grouping of the document request, not the documents.
7 Those are our documents. The FDA decides what they
8 want to respond to with Ms. Kessler's letter, and we're
9 entitled to know what the FDA responded with. That's
10 all we're asking for.

11 MR. SLATER: Your Honor, since this has
12 wider ramifications, obviously --

13 THE COURT: Hold on. I don't really know
14 if I'm going to let both of you argue this.

15 MR. SLATER: I'm sorry.

16 THE COURT: You huddle and decide who's
17 going to argue it. I'm very serious.

18 MR. SLATER: I understand.

19 THE COURT: Who's going to argue?

20 I run into this every now and then in
21 trials. When somebody starts with an issue, it's
22 usually their issue.

23 He made -- so if you're going to argue it,
24 then she is going to stay where she's seated and you're
25 going to argue it and you're going to respond from here

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1 on out. If not, then I'm going to deal with Ms.
2 Kessler.

3 So what's your choice?

4 MR. SLATER: No. Understood. It is Ms.
5 Kessler it was moved against. My only concern was
6 because they would then try to take this ruling and use
7 it against other counsel in the litigation, that was my
8 concern.

9 THE COURT: Well, look, there is a thing
10 called law of the case. And it remains discretionary.
11 But it also, especially when you're in front of the
12 same judge, it is the law of the case pretty much.

13 But I think we interrupted Mr. Carroll, so
14 let him finish.

15 MR. CARROLL: Thank you, Your Honor.

16 Turn to the issue of the cross-motion for
17 protective order. The only thing that would be subject
18 under Rhone-Poulenc to a protective order is what I
19 already have. There are other things that Ms. Kessler
20 claims are privileged, other than the documents which
21 are defendants' own documents, that at the very least
22 we get a privilege log. But as to a cross-motion for a
23 protective order, there's no privilege. We're not
24 seeking anything that's privileged. And there's no
25 undue burden, there's no harassment, there's nothing in

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1 the Rule 4:10-3 that plaintiff has satisfied her
2 burden. It's just not there.

3 It's very simple. We want the documents
4 that came back from the FDA. That's what we want to
5 know. End of the argument.

6 MS. KESSLER: Your Honor --

7 THE COURT: You have the floor.

8 MS. KESSLER: -- I think we need to take a
9 procedural step back here. That, first, the question
10 that they're seeking this information through is one of
11 these questions that we discussed before that I believe
12 is inappropriate. They're saying that they're entitled
13 to these documents that we received from the FOIA
14 through this question. It's Request Number 14.

15 THE COURT: I need to point out to you, and
16 I'm going to use this term throughout, they're public
17 records. They're documents, but they're also public
18 records. Some documents are corporate documents. Some
19 documents are personal, confidential documents. These
20 are public records. So all this stuff that's
21 downstairs in the clerk's office, public records.

22 MS. KESSLER: Uh-huh. And, Your Honor,
23 it's public records with the FDA. That's available,
24 just as available for the defendants to get as to what
25 I've gotten. But as to what I actually received, I

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1 didn't receive just what was publicly available from
2 the FDA. I made a request asking for these large
3 categories of documents that are very broad that I
4 don't think gives any impression as to what I think is
5 important, but then I had ongoing conversations with
6 the FDA and their FOIA office.

7 THE COURT: And I recall you telling me
8 that in our first phone conversation. It was sort of a
9 negotiation process.

10 MS. KESSLER: Uh-huh. Exactly. And that's
11 where we narrowed it down. And, you know, it was a
12 conversation where typically, I was told, that the
13 broad request that I gave to them takes about two years
14 to respond. And so we had a negotiation --

15 THE COURT: See, ain't that great?

16 MS. KESSLER: -- and a discussion as to,
17 well, you know, what is it that I'm truly really
18 seeking on an expedited basis. And that's why I
19 received documents as quickly as I did.

20 As to what particular documents I got,
21 that's a clear grouping. And Rhone-Poulenc, what Mr.
22 Carroll said, is Rhone-Poulenc says that "requesting
23 and receiving only certain documents that are available
24 to the public is a clear group." It's not just saying
25 that the grouping itself, the letter that I sent,

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1 that's the grouping. It's what I received that's the
2 grouping that's protected under the work product
3 doctrine.

4 And just procedurally another -- about this
5 motion is they're also in their proposed order, so this
6 is not just about the FOIA documents. They move on all
7 these other requests too. So if we're just narrowly
8 talking about the FOIA documents, I think that's one
9 thing. But, again, it's through these questions that
10 are truly inappropriate.

11 I mean, Number 14 that they're claiming
12 entitles them to these documents, I just would like to
13 read it. "All documents concerning Benicar, Benicar
14 HCT, Azor and Tribenzor that plaintiff or plaintiff's
15 agents or attorneys have received from any source."
16 That's a very problematic question.

17 THE COURT: A very broad question.

18 MS. KESSLER: I don't know if we even need
19 to get to the point about these FOIA documents.

20 THE COURT: My focus right now, because
21 what's before the Court is your request for a
22 protective order on the documents you received on your
23 FOIA request. So whatever I rule on today is that.

24 MS. KESSLER: Is just limited to that. I
25 understand.

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1 MR. CARROLL: Well, let's go to the
2 response to Number 14.

3 "Plaintiff states she has none in her
4 possession." We accepted that. We accepted that until
5 October last year when we got a letter. Ms. Kessler
6 informed us that she had obtained documents from the
7 FDA. And don't forget the argument there was that we
8 didn't need a protective order for anything in the FDA
9 because she went and got documents from the NDA -- from
10 the FDA, excuse me.

11 What Ms. Kessler is talking about here is
12 not her thought process, it's what the FDA decided to
13 give her in response to this letter. We're entitled to
14 know that. What the FDA did is not work product. What
15 the FDA gave her is not work product. We're entitled
16 to have it. You said we should have it back in
17 December.

18 THE COURT: And we need to talk about --
19 and I'll let Ms. Kessler start. We need to talk about
20 how do we define work product.

21 MS. KESSLER: I think Hickman Taylor is,
22 you know, the best place to start, with the Supreme
23 Court that said that the lawyers need to be free from
24 unnecessary intrusion by opposing parties and counsel,
25 that we --

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1 THE COURT: That's not a definition, that's
2 a statement of a perspective. What's the definition of
3 work product? Because it's readily available, the
4 definition.

5 MS. KESSLER: I think there's two things.
6 First is they have to prove relevancy.

7 THE COURT: Again, you're not -- I'm sorry.
8 You're not -- relevancy is not a definition of work
9 product.

10 MS. KESSLER: Well, Rhone-Poulenc, how they
11 define work product, and how these cases in Jersey also
12 define work product, it's the thoughts, the opinions,
13 the investigation and the resourcefulness of the lawyer
14 involved.

15 And on top of it, there's another --

16 THE COURT: You're almost there. You're
17 almost there to the definition.

18 MS. KESSLER: There's another limitation as
19 to what's discoverable in Jersey, and that's factual
20 information, that discovery is based on what factually
21 exists. What they're seeking from me has to do with
22 legal theory. It has to do with my thoughts and
23 opinions. Making a FOIA request to the FDA, that was
24 my investigation, my resourcefulness. And it was a
25 result of me knowing and understanding that it would

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1 take me a long time to get these documents from the
2 defendants, that I want to know before, in anticipation
3 of filing these claims for my clients, that I would
4 understand some of the communication that was happening
5 between the FDA. And what I believe was most important
6 to pursue these cases. It's truly a thought process.
7 It's my resourcefulness. It's my investigation. And
8 it should --

9 THE COURT: No, no, no, no. You're --
10 it's -- we're focused on public records. And my
11 question is, what's in those that's work product?

12 MS. KESSLER: I think it's the documents
13 that I received from the FDA is work product because it
14 includes my thoughts and my mental impressions as to
15 what's important.

16 THE COURT: When I look at Rule 4:10-2(c),
17 and I don't know this for certain, but I think Judge
18 Pressler had a whole lot to do with what I think
19 amounts to a codification, a codification of attorney
20 work product under New Jersey common law. And how she
21 defines it, if you look at the last sentence of
22 subsection c of 4:10-2, "In ordering discovery of such
23 materials when the required showing has been made, the
24 court shall protect against disclosure the mental
25 impressions, conclusions, opinions, or legal theories

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1 of an attorney or other representative of a party
2 concerning the litigation."

3 And then -- and I know this is her
4 language -- when you go to -- and I'm a huge admirer of
5 Judge Pressler. There's some people you wish could
6 live forever so you can have them around to pick their
7 brain. And I got to know her through Judge King,
8 because Judge King was a friend of my original mentor,
9 who is still kicking around at 83, practicing law. But
10 they grew up together in Camden, so I got to know Judge
11 King through John Berman. And I got to know Judge
12 Pressler through Judge King.

13 And when I look at 4.1, note 4.1 of
14 4:10-2(c), a very simple declaratory statement. "The
15 fundamental test of applicability of the work product
16 privilege is whether the material sought to be
17 discovered were prepared in anticipation of litigation
18 rather than the ordinary course of business."

19 That last phrase we can forget about.

20 But I'm considering these documents, and
21 I'm saying to myself, they weren't prepared by a
22 lawyer. They weren't prepared by a lawyer in
23 anticipation of a litigation. They weren't prepared by
24 a lawyer representing the plaintiff. There's my
25 problem.

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1 MS. KESSLER: I don't think the documents
2 themselves have to be prepared by a lawyer. I think
3 it's the grouping of the documents that shows the
4 mental impression --

5 THE COURT: Well, that's a novel argument
6 and that's a novel approach to the law by the decision
7 that you're relying upon, but I don't think there's
8 anything in New Jersey law that supports this position.

9 MS. KESSLER: Well, it's the case that they
10 cite, Dougherty, that they believe supports their
11 position. The reason why the Court decided that open
12 court testimony -- that the testimony, the transcript
13 of what had happened in open court was not work
14 product, is because they said -- the Court noted that
15 the hearing transcript was not "a product of counsel's
16 investigation or resourcefulness," that sending a court
17 reporter to just transcribe what occurred in open court
18 does not reflect any mental impressions, it does not
19 reflect any thought process.

20 THE COURT: You're asking for specific
21 documents to be protected and kept from your adversary.
22 And I sat down the other night, after having reviewed
23 everything. And let me read for you my list of how I
24 view this. And you can respond one by one, but tell me
25 what I got wrong here.

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1 Okay. The contents of these public records
2 were not created in anticipation of litigation, nor
3 were they prepared by plaintiffs' counsel.

4 MS. KESSLER: But --

5 THE COURT: Do I have that wrong?

6 MS. KESSLER: The documents themselves, the
7 documents that the FDA have --

8 THE COURT: Because I'll recognize some of
9 those documents could have been prepared by a lawyer,
10 but they weren't prepared by you.

11 MS. KESSLER: I agree with that.

12 THE COURT: And they weren't prepared in
13 anticipation of litigation.

14 MS. KESSLER: But the request that I made,
15 the fact that a request was even made, that was
16 prepared by me.

17 THE COURT: I know that, but that's not the
18 document that you're asking to be protected.

19 MS. KESSLER: But the document -- by
20 producing the documents, it does produce my mental
21 impressions.

22 THE COURT: Ah. Let me go through my list,
23 because I think -- I think that you think we're a whole
24 lot brighter than maybe we are. Okay? Because your
25 implicit -- I think implicit in what you're saying is

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1 an assumption that we can extrapolate backwards from
2 the results of the selection process to determine the
3 reason that the record was obtained by you in the first
4 place. I don't know if we can.

5 This is not like case law at all. In case
6 law, you got the conclusions, you got the reasoning,
7 you know it's right there, the judge articulated it.
8 But you're assuming that we're going to be able to read
9 your mind.

10 MS. KESSLER: I don't think I'm assuming
11 that. I think it's clear that the defendants have what
12 I requested, which are very broad categories which I do
13 not think show my process. But either way, that was a
14 limited waiver for the purpose of the Rahman motion to
15 compel.

16 On top of that, I received a fraction of
17 what I requested from the FDA.

18 THE COURT: But you're asking me to stray
19 from the rule. You're asking me to ignore the
20 codification that I think Judge Pressler wrote. And
21 you're asking me to say something new that I don't
22 think has been done in New Jersey law. I mean, that
23 rule reads the way it reads for a reason. Mental
24 impressions, conclusions, opinions or legal theories
25 that were articulated by the party's lawyer. And we

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1 don't have that situation here at all. We really
2 don't.

3 This is a novel argument, but I don't think
4 it's supported by the rule and I don't think it's
5 supported by any New Jersey case law.

6 MS. KESSLER: I think it is, Your Honor.
7 And I think Rhone-Poulenc defines that for us.

8 THE COURT: That's not New Jersey case law.

9 MS. KESSLER: I know it's not New Jersey
10 case law, but it explains that a grouping means a
11 thought process, it is a mental impression. And the
12 grouping of the documents that I received back from the
13 FDA --

14 THE COURT: So you're asking me to
15 ignore -- and, see, I don't know if we can do -- if you
16 can do this both ways.

17 You're asking me to ignore the contents of
18 the documents because we agree, they weren't prepared
19 by you, and they don't contain your opinions or
20 medical -- mental impressions. But then the flip side
21 of that is you're asking me to assume that when
22 somebody reads those documents, then they're going to
23 have a window into your mind.

24 MS. KESSLER: Your Honor, I'm asking that
25 the defendants need to show that there's a substantial

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1 need --

2 THE COURT: No, no, no, no. You have the
3 burden of proof. Case law is real clear.

4 MS. KESSLER: For the protective --

5 THE COURT: On the request for a protective
6 order, you have the burden of proof.

7 MS. KESSLER: But they also have the burden
8 of proof on their motion to compel. And if their
9 question itself is not proper, then whatever flows from
10 that --

11 THE COURT: Eh.

12 MS. KESSLER: But I understand what you're
13 saying, Your Honor. But at the end of the day, this
14 information is available to the defendants. Whatever
15 the FDA has, they also already have. And on top of it,
16 they can make their own request, their own FOIA
17 request, and get these documents themselves.

18 So why are they seeking these documents
19 from me? How are they relevant, other than to show my
20 mental process when they already have these documents?
21 There's no substantial need to produce these documents.

22 THE COURT: Well, what I -- here's what I
23 do know. And we're going to let Mr. Carroll speak for
24 himself. What I do know is there's a lot of documents
25 here. Okay? And so if they -- you know, sort of like

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1 weeding the garden. If they can figure out, you know,
2 what's real and what isn't, they're going to be further
3 along than they are.

4 But, Mr. Carroll, why don't you respond to
5 that question. Why do you need them other than to have
6 a window into her brain?

7 MR. CARROLL: I have the window into her
8 brain. I got it in October of last year.

9 I'm entitled to know what documents
10 involving our products are in the plaintiffs'
11 possession. When we asked that question, it was after
12 this request was made. The response wasn't, I have
13 documents but they're privileged. The response was,
14 none. That was incorrect then. It's incorrect now.

15 Rhone-Poulenc, any way you read it, doesn't
16 apply here. Ms. Kessler said a few moments ago that
17 they're on limited waiver. If Rhone-Poulenc applies,
18 and I don't agree that it does, this letter waived any
19 attorney-client work product as to what came back.

20 Again, what she has isn't a result of what
21 she asked for. What she has is a result of the FDA's
22 decision on how to respond to the grouping that she
23 provided both to the Court and the defendants last
24 year.

25 This is work product. Your Honor is

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1 correct. I'm not going to beat a dead horse here. But
2 Ms. Kessler is asking the Court to depart from the
3 rule, to depart from New Jersey law, and adopt an
4 unreported 1991 Eastern District of Pennsylvania case
5 that's got a lot of red flags on it.

6 The analysis, if you accept it for the
7 purposes of this motion, doesn't apply. Why? We have
8 the grouping. Why do we have the grouping? It was
9 given to us. And until we got the grouping, we didn't
10 know that there had been records received from the FDA.
11 It's responsive to our Request for Production Number
12 14. We need to get the documents. We're entitled to
13 the documents.

14 MS. KESSLER: Your Honor, if they agree
15 that it's work product, then we're under Rule 4:10-2,
16 which, again, they need to show a substantial need.
17 And under Kinsella, there's three things that the
18 defendants must to show: One, a legitimate need for
19 the evidence; its relevance to any issue before the
20 Court; and, three, lack of availability from any less
21 intrusive source.

22 Again, they can make a FOIA request, they
23 can take my request, my categories and do the same
24 things and probably receive the documents in a short
25 period of time also. There's nothing preventing them

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1 from getting these documents.

2 And, two, they have these documents. Any
3 communications that they had with the FDA and the
4 communications that the FDA had with them, they already
5 have.

6 So, again, Mr. Carroll is not answering the
7 question as to why, what substantial need is there to
8 receive these documents from me, other than the fact
9 that it does show my mental impressions, my thoughts
10 and process.

11 And just to make this point again, the
12 requested stuff that I made to the FDA, there's no
13 question that's work product. And anything that flows
14 from that, anything that I receive from the FDA, all
15 falls within the work product doctrine, whether it's
16 public records or not.

17 THE COURT: It doesn't fall within the
18 definition prescribed by Judge Pressler. There's my
19 problem.

20 MS. KESSLER: Anything prepared in
21 anticipation of litigation that shows the mental
22 impressions.

23 THE COURT: Yeah, but these documents
24 weren't prepared by you in anticipation of litigation.

25 MS. KESSLER: It absolutely was. The

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1 request that I made to the FDA --

2 THE COURT: The documents are public
3 records. The documents are public records that you got
4 from FDA. That's what these documents -- I mean, you
5 want me to ignore what these documents are?

6 MS. KESSLER: But how I got the documents
7 matter, Your Honor. And I got it through a FOIA
8 request that I made in anticipation of litigation.

9 THE COURT: I don't -- I honestly don't --
10 I think, candidly, the issue that you have framed
11 here -- and this is -- I am enjoying this. Don't think
12 I'm not. I think it's an issue of first impression. I
13 don't think a New Jersey court has ruled on this
14 question. We're talking public records. We're not
15 talking about general documents that are in somebody's
16 possession because of an estate or because of a
17 business or because of, you know, some sort of
18 confidential exchange that may have been prepared by a
19 lawyer or not. We're talking about public records.

20 MS. KESSLER: All right, Your Honor, then
21 let me maybe use an analogy, because a lot of the
22 information that the defendant -- that's relevant to
23 this case potentially is also available publicly. You
24 can Google --

25 THE COURT: That's true.

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1 MS. KESSLER: -- you can do this. All
2 this -- just because it's available publicly doesn't
3 mean that it's suddenly not work product. And the
4 request that I made to the FOIA, that was clearly in
5 anticipation of litigation. I don't think that's even
6 in dispute, the reason why I requested these records.

7 And so anything that flows from that, the
8 documents that I received, they're protected under this
9 doctrine. And it's a very dangerous road to go down,
10 that if it's not protected, that these sort of requests
11 as to how I'm compiling information to the defendants,
12 which aids not only discovery in this case but makes it
13 more efficient, which is why it was cited in the motion
14 to compel, because the defendants at that time were
15 claiming that everything I was seeking was
16 confidential. And our concern was overdesignating.
17 And that concern is still there. And that was the
18 purpose of why we were showing it.

19 I should be able to have an investigation
20 completely free of the defendants' ability to see what
21 I'm investigating and why it's important. It's my
22 resourcefulness at the end of the day. And I think
23 Dougherty supports that when they say that a court
24 transcript, you know, that's one thing. Sending a
25 court reporter to transcribe what happens in open

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1 court, that's not resourcefulness, that's not
2 investigation. But this negotiation that I had with he
3 FDA to receive documents that they originally told me
4 would take two years to gather, that I received on a
5 very short-term basis, what those documents are, that
6 is my thought process and that is my resourcefulness.

7 THE COURT: I respect everything you say.
8 Mr. Carroll?

9 MR. CARROLL: Correction first, Your Honor,
10 I am not admitting that this is work product.

11 THE COURT: I didn't think you did.

12 MR. CARROLL: Well, I heard that.

13 THE COURT: I heard it too, but I don't
14 think you had it.

15 MR. CARROLL: Want to make that clear.

16 We don't want to be surprised. We want to
17 know what Ms. Kessler got. And we don't know if there
18 are internal FDA documents that we don't have in there.
19 We don't know.

20 Don't forget, in response to the request
21 for production, all documents regarding Benicar, we
22 don't have any. It wasn't true then. It's not true
23 now. We're entitled to the documents.

24 Thank you, Your Honor.

25 THE COURT: Okay.

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1 Ms. Kessler?

2 MS. KESSLER: Your Honor, so Mr. Carroll
3 has not answered the question as to why they need these
4 documents from me. They can make a FOIA request. They
5 can get these documents. If they're concerned that in
6 their own defendant and their own client records that
7 they don't have complete internal documents, then make
8 a FOIA request. There's nothing that's stopping them.
9 I am fine with them taking my letter and making a
10 request. That's fine. I will even pay the cost of
11 that or split the cost with them. It's about \$120, and
12 it takes about a couple weeks.

13 You know, it's not -- but this grouping,
14 these documents that I received after negotiating with
15 the FDA, they are work product. And I think we need to
16 go back and that, on their motion to compel, that the
17 basis that they're compelling this information is in a
18 very problematic and inappropriate question. And
19 that's their only basis for saying that they're
20 entitled to this information.

21 So if the question itself falls, you know,
22 this whole argument that flows from it also falls.

23 Thank you.

24 MR. CARROLL: These are documents that
25 were --

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1 THE COURT: Do you think there's a chance
2 you really don't have any of these documents somewhere?

3 MR. CARROLL: I don't know. Yes, there is
4 a chance. I simply don't know.

5 These are not attorney work product
6 documents. They weren't created by an attorney. And
7 this is a point you made back in December or January.
8 They weren't created by an attorney. They're not
9 attorney work product.

10 THE COURT: Well, some of them may have
11 been created by some attorney somewhere.

12 MR. CARROLL: Not the attorney who's trying
13 to claim work product, Your Honor.

14 THE COURT: Okay. Go ahead. I'm not
15 cutting you off.

16 MS. KESSLER: One more analogy would be,
17 there's a lot of information public about our
18 plaintiffs also. You know, I'm sure they're Googling,
19 I'm sure they're mining this information.

20 THE COURT: Boy, what a world we're living
21 in now. Right? The things that I see litigants put on
22 their Facebook pages? Wow. Talk about fools.

23 MS. KESSLER: Well, that's scary.

24 THE COURT: I see it all the time. And
25 read the contract with Facebook. You have no

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1 expectation of privacy.

2 MS. KESSLER: Are we then also entitled to
3 their investigation that they're having -- undergoing?
4 I'm sure they're doing background checks. I'm sure
5 they're mining social media information. You know,
6 they're fully investigating our clients too. Are we
7 entitled to that investigation that they're doing also?
8 You know --

9 THE COURT: Well, the answer is, you may be
10 entitled to it at some point if they decide they're
11 going to rely upon it. I don't know -- we're -- you
12 and I are, for purposes of this dialogue, assuming that
13 they did something like that. I don't know if they did
14 or they didn't. And if they did and they're going to
15 rely up on it, we'll all know about it because there
16 won't be any secrets.

17 MS. KESSLER: Your Honor, I never said I'm
18 relying on this information. I need to have the
19 documents authenticated by the defendants. They need
20 to come from the defendants.

21 THE COURT: Okay. Anything else?

22 MR. CARROLL: Nothing further, Your Honor.

23 THE COURT: Okay. All right. I will have
24 my ruling on the protective order soon. I do not
25 procrastinate. There's a couple other things that I

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1 want to look at, but I'll do my best to get it done
2 very quickly.

3 Now, anything else we need to resolve
4 before we break? Because I think you have IT people
5 that need to speak with our IT people and get you set
6 up.

7 Who's going to go first on the Science Day?

8 MS. SHARKO: Oh.

9 THE COURT: Did you agree on that?

10 MS. SHARKO: No. I submitted to the
11 plaintiff a day or two ago that I should go first since
12 it's our product. They told me like at 7:00 last night
13 they disagreed, so --

14 THE COURT: Flip a coin.

15 MS. SHARKO: I think it's for Your Honor to
16 choose.

17 THE COURT: Flip a coin. Does anybody have
18 a coin? I have a couple mints, which I should probably
19 hold on.

20 MR. CARROLL: I've got a coin.

21 THE COURT: You two flip a coin. It
22 doesn't matter to me who goes first. I thought maybe
23 you had agreed on that.

24 MR. CARROLL: What's your call?

25 MR. SLATER: Oh. Let me see that coin.

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1 I'll let him flip it and I'll let Ms.

2 Sharko call it.

3 THE COURT: You going to call it?

4 MS. SHARKO: Heads.

5 THE COURT: Let it drop on the floor.

6 What is it?

7 MR. CARROLL: Heads, Your Honor.

8 THE COURT: Okay. So your choice.

9 MS. SHARKO: I'd like to go first.

10 THE COURT: Okay.

11 MR. SLATER: You'll receive, okay.

12 THE COURT: Okay. Each side has an hour.

13 And we'll take whatever break makes sense in between

14 the two presentations, 10 minutes, 15 minutes.

15 MR. SLATER: There are a couple other
16 issues that I would like to address for the case
17 management conference, but I don't want to usurp on the
18 Science Day. We're good for this afternoon then?

19 THE COURT: Yep.

20 MR. SLATER: Okay. Your Honor, just for
21 the record, Ms. Sharko had mentioned something about an
22 agreement we reached in Anzalone. I think we should at
23 least have it on the record. One of my cases is the
24 Anzalone case.

25 MS. SHARKO: Do you want to put the whole

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1 agreement on the record?

2 MR. SLATER: No. Just the admissions.

3 MS. SHARKO: It's everything or nothing.

4 MR. SLATER: I don't understand that.

5 We're going to talk. We'll talk to you in the

6 afternoon about that. I just got confused by

7 something.

8 The other thing is, there are other aspects

9 of discovery.

10 THE COURT: I'm hoping we're going to talk

11 about some sort of schedule for depositions of fact

12 witnesses starting with the plaintiffs.

13 MR. SLATER: All right. I think that that

14 should probably be part of the meet and confer process

15 in the next few weeks.

16 THE COURT: I'm okay with that too.

17 MR. SLATER: Okay. And I think we're

18 agreeable to that. We'll figure out what makes sense

19 to stagger them in a reasonable way.

20 There are various categories of discovery

21 that earlier counsel had said, you know, nobody has

22 asked for anything else since they started to produce.

23 We've actually been having an ongoing meet and confer

24 process in earnest. It went from January to about

25 March. And there's various aspects of information that

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1 the defense has assured us you're going to get this,
2 you're going to get this; however, a lot of it has not
3 been produced. And I would think that just by having
4 an open discussion real quickly, I think we can
5 probably get assurances and get some deadlines, because
6 a lot of it is foundational. For example --

7 MS. SHARKO: Can I suggest we have a meet
8 and confer? I have no idea --

9 MR. SLATER: We've done it for five months.
10 That's the problem. That's why I'm here to raise it
11 now.

12 MS. SHARKO: I have no ideas what issues
13 Mr. Slater is going to raise. I think we should talk
14 about it.

15 THE COURT: All right. Here. My notes say
16 that you're going to each be furnishing additional
17 discovery to the other by June 26th and that prior to
18 that date you're going to meet and confer. So what
19 happens on the 26th is that you give each other
20 everything you think the other one is entitled to.

21 And I think rather than any sort of
22 telephone conference call, that we'll meet, you know,
23 the Court with the two litigants will meet and confer
24 in July, and we can have an on-the-record management
25 conference in our conference room. I'll pick a date in

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1 July. This is May, so I hope whatever date I pick will
2 give you enough notice.

3 And whatever issues are outstanding then,
4 we'll try to reasonably get to a solution. And then
5 enter an order that will address all the issues that
6 you've agreed to and all the issues that you've forced
7 me to make a decision upon because you couldn't agree
8 to.

9 How does that work?

10 MR. SLATER: That's fine.

11 MS. SHARKO: That's fine.

12 MR. SLATER: And many of these will
13 probably be resolved before that.

14 THE COURT: It will be early July. You
15 know, it won't be -- you're going to get everything you
16 want done on your end by June 26th, and sometime
17 probably within the first 14 days or earlier in July,
18 we'll meet. It will be sometime within the first two
19 weeks.

20 MR. SLATER: That's fine.

21 THE COURT: Does that make sense?

22 MR. SLATER: You said it. It makes sense.

23 THE COURT: Okay.

24 MS. SHARKO: The only remaining issue then
25 is Ms. Kessler, who is the person who brought us here

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1 to Atlantic County, has started to file cases in other
2 courts around the state for out-of-state plaintiffs.

3 Our view is those cases should be --

4 THE COURT: I can't stop her from doing
5 anything. You know what? I haven't -- you sent me an
6 order, and Paragraph 17 said that the -- do I have this
7 confused with another one?

8 MS. SHARKO: This is -- that's an issue
9 in --

10 THE COURT: Because it's you popping up
11 again.

12 I can't -- you know, until there's an MCL,
13 because, you know, in New Jersey we call it MCL. Until
14 there's an MCL designation, she is free to file
15 wherever she wants. You know, Judge Mendez had that
16 conversation with -- who was it, Ms. Allegretto? Was
17 it Mr. Wolf?

18 MS. SHARKO: Judge Martinotti?

19 THE COURT: Yes, Mr. Wolf.

20 MS. SHARKO: Okay.

21 THE COURT: And the judiciary's attitude is
22 until there is an MCL designation or until the parties
23 agree otherwise, then somebody can make a motion or --
24 you know, I'm going to take -- we're talking about Talc
25 now for a moment.

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1 I'm going to take your Paragraph 17 in that
2 order, and I'm basically going to say that, you know,
3 either party is free to make whatever motion they want.

4 MS. SHARKO: Okay. That's fine. That was
5 the only disputed paragraph in that order.

6 THE COURT: Yeah. I was going to say.
7 And, Dane, do we have that in a Word?

8 MR. WUILLERMIN: Yes.

9 THE COURT: I didn't get a chance to talk
10 to Sheryl about changing that -- we have it in a Word
11 document? So I'm going to change that paragraph --

12 MS. SHARKO: Okay.

13 THE COURT: -- to say that either party can
14 file a motion.

15 But it holds true here. She's going to
16 file wherever she wants to file.

17 MS. SHARKO: Okay. Got it. Thanks.

18 THE COURT: Okay. Anything else?

19 MS. KESSLER: No, Your Honor.

20 THE COURT: Okay. It's 10 of 12:00. At
21 1:00 hopefully Judge Kugler, Judge Schneider and I
22 think their law clerks are coming, too, will be here
23 and we'll met -- be in here and Joe will escort you
24 back, but be in here a few minutes before 1:00 because
25 we'll get started as close to 1:00 as we can. And

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1 we'll have our Science Day.

2 You can leave everything right here. It
3 will be safe.

4 Let's go off the record.

5 (Hearing concluded at approximately
6 11:49 a.m.)

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